87

①

Supreme Court, U.S.
FILED
07 1156 MAR 10 2008
OFFICE OF THE CLERK

No. ______

In The
Supreme Court of the United States

◆

DENNIS MICHAEL, ET AL.,
Petitioners,
v.
MARGARETTE GHEE,
CHAIRPERSON, OHIO ADULT
PAROLE AUTHORITY, ET AL.,
Respondents.

◆

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI
with Appendix

◆

*Norman L. Sirak
ATTORNEY AT LAW
4974 Higbee Avenue, N.W. #203
North Canton, OH 44718

330-493-7462

Attorney for Petitioners

**Counsel of Record*

March, 2008

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED

1. Whether a Parole Board's mandate to protect the public's safety legitimizes the act of considering core questions of guilt or innocence for new criminal behavior and, if found guilty, ordering an upward departure in the offense of conviction, thereby placing an offender in a guideline suitable for a crime never proven to a jury or acknowledged in a plea, substantially postponing meaningful parole consideration and significantly enlarging the minimum sentence contrary to the plain language of a trial court judgment.

2. Whether a Parole Board's mandate to protect the public's safety legitimizes the act of broadening the scope or reconfiguring the weight given to offensive behavior associated with a crime and declaring this extraneous or already contemplated behavior an *aggravating factor*, attaching a sentencing consequence to this *aggravating factor* similar to a sentencing enhancement, even though this conduct cannot be found in an indictment, it is not admitted in a plea or proven to a jury, thereby justifying an upward departure in the offense of conviction, compelling an inmate to serve prison time *above* the guideline matching the conviction, substantially postponing meaningful parole consideration and significantly enlarging the minimum sentence.

LIST OF PARTIES

Petitioners are 3,378 former and current Ohio inmates, whose names and prison identifying numbers are attached.

Respondents are current Members of Ohio's Parole Board and the Director and Deputy Director of Ohio's Department of Rehabilitation and Correction.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

PERTINENT BACKGROUND 4

STATEMENT OF THE CASE 11

REASON FOR GRANTING REVIEW 41

CONCLUSION 54

APPENDIX

TABLE OF AUTHORITIES

CASES PAGE

Baca v. Owens, Case No. 07-51148 44

Brasfield v. Owens,
Case No. A-05-CV-1009 SS 44

Heck v. Humphrey, 512 U.S. 477 (1994) 5, 6

Hicks v. Oklahoma, 447 U.S. 343 (1980) 22

Joint Anti Fascist Refuge Committee
v. McGrath, 341 U.S. 123 (1951) 25, 32

Layne v. Ohio Adult Parole Authority,
97 Ohio St. 3d 456 (Oh. 2002) .... *passim*

Michael v. Ghee, 411 F. Supp. 2d 813
(N.D. Ohio 2006) 1

Michael v. Ghee, 498 F. 3rd 372
(6th Cir. 2007) 1-2, 37, 38

Named Plaintiff's Group v.
Rissi L. Owens, et al,
Case No. 1:07-CV-00962-SS 48

State ex rel. Vaughn v. Ohio Adult Parole
Authority, 708 N.E.2nd 720 (Oh. 1999) 9

U.S. v. Booker, 543 U.S. 220 (2005) 25, 32

Wilkinson v. Dotson, 544 U.S. 74 (2005) ...... *passim*

STATUTES

204 Pa. C.S.A. 303.10(a)(1) 46

204 Pa. C.S.A. 303.10(a)(2) 46

204 Pa. C.S.A. 303.17 46

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 2241 - 2254 20

42 U.S.C. § 1983 .... *passim*

61 P.S. § 331.1 4

Chapter 5 of Title 37 of the
Texas Administrative Code 4

Government Code Chapter 508 4

V.T.C.A. Tex. Gov. Code § 508.144(b) 48

V.T.C.A. Tex. Gov. Code § 508.145(d) 44

RULES

Fed.R.Civ.P. 12(b)(6) 6, 35, 44

REGULATIONS

Ohio Admin. Code § 5120:1-1-10(B)(2) 9

Ohio Admin. Code § 5120:1-1-13 9

Ohio R.C. § 2903.06 [pre-1996 30

Ohio R.C. § 2967.03 9

Ohio R.C. §2967.13 [Pre-1996 10

Ohio R.C. § 2967.16 (A) 9

OTHER AUTHORITIES

Parole Board Guideline Manuel,
2nd Edition, April 1, 2000 .... *passim*

In the Supreme Court of the United States

DENNIS MICHAEL, et. al,
Petitioners,
v.

CYNTHIA MAUSSER, Chairperson,
Ohio Adult Parole Authority, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dennis Michael and 3,378 former and current Ohio inmates respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court decision is captioned *Michael v. Ghee,* 411 F. Supp. 2d 813 (N.D. Ohio 2006) and the appellate court decision is *Michael v. Ghee,* 498 F.

3rd 372 (6th Cir. 2007). An *en banc* appeal consists of just a letter denying *en banc* review. This letter is reproduced at App. A.

JURISDICTIONAL STATEMENT

The district court judgment was entered on February 1, 2006 and duly appealed. The appellate judgment was rendered on August 10, 2007. An appeal for *en banc* consideration was filed on August 22, 2007. On December 21, 2007, this *en banc* appeal was denied. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments and the Civil Rights Statute, 42 U.S.C. § 1983 [hereafter *§ 1983*] are all involved.

The Fifth Amendment states in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law ..."

The Sixth Amendment states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment reads in pertinent part that: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights statute [42 U.S.C. § 1983] states in relevant part that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

PERTINENT BACKGROUND

From 1992 to 1996, Parole Boards across the country experienced a bipolar transformation in their delegated mission. Instead of placing top priority upon rehabilitation accomplishments, Parole Boards were ordered to first and foremost weigh the public's safety before releasing an offender. In some cases, this new mission was dictated by the legislature.[1] In other cases, this was done *sub silentio* (i.e. in silence without formal notice being taken) by executive action through political appointments.[2] The effort previously devoted to reviewing an institutional record transitioned from a job into a myth – something widely believed to be true but factually false. Under its new role as protector of the public's safety, Parole Boards shifted their focus to a review of an inmate's offense of conviction and prior criminal history.

---

[1] *See* §1 Pennsylvania's Parole Act, 61 P.S. § 331.1. [placing public safety first and foremost]

[2] In Texas, no priority is placed upon the public's safety in Government Code Chapter 508 and Chapter 5 of Title 37 of the Texas Administrative Code. But

Focusing upon their crime instead of their prison record dramatically altered the decision-making process. Primary reliance was no longer placed upon suitability factors an inmate can influence, such as discipline free conduct and a marketable skill. Instead, decisions were dictated by whether or not the offender had served enough time for their crime. Good cause for denying parole typically consisted of their current or past crime. Conduct once assuring an inmate of parole suddenly carried little or no significance.

In 1994, this Court decided *Heck v. Humphrey*, 512 U.S. 477 (1994) [hereafter *Heck*]. *Heck's favorable*

---

parole decisions rely in part or in whole upon an unchanging factor, either *nature of the crime* or *past criminal history*, which are outward manifestations of public safety.

termination requirement states that if a prisoner wishes to challenge their state law conviction or sentence, before coming to federal court, they must be prepared to show that their conviction or sentence has been invalidated. District courts began applying *Heck* to state prisoner parole challenges. Challenging a parole denial was considered equivalent to challenging a conviction. For a person in prison, invalidating their conviction was impossible. These lawsuits were all routinely dismissed under Fed.R.Civ.P. 12(b)(6) until this application of *Heck* was reversed by *Wilkinson v. Dotson*, 544 U.S. 74 (2005) [hereafter *Wilkinson*]. For a ten year period halted finally by *Wilkinson,* Parole Boards enjoyed carte blanche authority to take any liberties they desired with a trial court's offense of conviction, armed with the knowledge that their acts would never be scrutinized by a federal judge, thanks to *Heck's* protective shield.

In 1998, Ohio adopted parole guidelines tailored to exploit this void. By this time, immunity from federal scrutiny spawned by *Heck* was well established. These guidelines gave the Parole Board the power to overrule a judge and change the offense of conviction by finding an offender guilty of a new crime. These guidelines also reconfigured the pre-1996 Ohio penal code by inventing sentencing enhancements, termed *aggravating factors*, which broadened the scope and reconfigured the weight assigned to offensive behavior associated with a crime, contrary to a plain reading of the statute. This authority was known and referred to as making *upward departures in offense convictions*. It was justified by a duty to protect the public's safety. These practices were never sanctioned by Ohio's legislature.[3]

On December 18, 2002, Ohio's Supreme Court addressed this issue. The Parole Board was told that it *must assign* an inmate the offense category score matching the conviction.[4] Despite this binding order, clauses in the guideline manual granting authority to make upward departures remained in force and Ohio's Parole Board continued to make upward departures. Without exception, the Parole Board's offense was *always* more severe.

---

[3] Parole Guidelines were never submitted to the Joint Committee on Agency Rule Review pursuant to Ohio R.C. § 111.15(D)(1) and (4). They never satisfied the prerequisites of Ohio R.C. § 119.03(H)(1) and (2) for inclusion in Ohio's Administrative Code.

[4] *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456, 464 (Oh. 2002) [hereafter *Layne*].

Ohio's Public Defender pursued a class action lawsuit to enforce the *Layne* decision. The Parole Board argued that one sentence in *Layne*, which allowed it to consider matters beyond the offense of conviction, still permitted upward departures. An Ohio appellate court squarely confronted this issue and the Parole Board was told, once again, "*Layne* prohibits this procedure." (R. 262, Exhibit A. *Ankrom*, Apx. p. 1412) The State did not appeal this adverse ruling. Instead, the Parole Board simply continued its practice of making upward departures. A motion was filed to find the Parole Board in contempt. Unlike federal judges with lifetime appointments, Ohio judges must stand periodically for re-election. A media campaign accusing the judge of releasing the *worst of the worst* into surrounding neighborhoods succeeded. Efforts to enforce these decisions were simply not acted upon.

The Parole Board's authority to make upward departures began March 1, 1998 and continued until July 1, 2007. For nine years, only inmate's convicted of aggravated murder were exempt from an upward departure in offense. Parole regulations in Ohio authorize continuances for up to ten years between reviews. [5] Five to eight year continuances are the norm. Once done, a parole panel's decision cannot be undone. Ohio judges cannot grant a parole.[6] An Ohio inmate has no right to an earlier consideration of parole.[7] Parole decisions issued prior to July 1, 2007 will compel Plaintiffs to serve time in elevated guidelines till at least 2014, which Ohio inmates must serve day for day without any assist in good time credit.

In the current guideline manual issued on July 1, 2007, upward departures have gone underground. The term *upward departure* is gone. Crimes previously engaging the 11th or 12th guideline are now assigned to the 13th and highest guideline. In prior guideline editions, *murder with eligibility for parole* engaged a guideline of 15 to 20 years for a first time offender. The court sentence for murder is set forth in a statute and merely imposed by a judge. This statute requires 11 years to life. The guideline in prior manuals for pre-meditated aggravated murder was 25 years to life for a first time offender. The court sentence for this crime also tracks a statute which leaves no room for judicial discretion. Parole eligibility begins after 15 to 20 years and can run to life.[8] In the July 1, 2007 manual, the highest guideline is titled *min.-life* – telegraphing the message that parole no longer applies. Aggravated murder *and* murder are assigned to this *min.-life* guideline. The pre-meditated and non-premeditated difference in these crimes is deemed inconsequential. Every *murder* conviction has been issued an upward departure to *aggravated murder*. But only an intimate knowledge of prior guideline editions would make this upward departure discernible.

---

[5] *See* Ohio Admin. Code § 5120:1-1-10 (B) (2).

[6] *See* Ohio R.C. § 2967.03. *See also* Ohio R.C. § 2967.16 (A) and Ohio Admin. Code § 5120:1-1-13 (retaining control to grant final release).

[7] *See* State ex rel. *Vaughn v. Ohio Adult Parole Authority*, 708 N.E.2nd 720, 721 (Oh. 1999) [holding there is no right to earlier consideration of parole].

These parole guidelines only apply to offenders with crimes occurring before July 1, 1996.[9] By July 1, 2007, many offenders receiving an upward departure served this time and were released. This pool of inmates has been declining. After 11 years, the usefulness of an upward departure clause diminishes as the number of vulnerable offenders nears exhaustion. By July 1, 2007, offenders waiting for hearings are primarily serving life sentences, and they are getting assigned to a *min.-life* guideline. This brings the evolution of parole decision-making full circle. With a guideline titled *min.-life*, rehabilitation achievements become irrelevant. This *min.-life* guideline defies *both* a statute and a court order, which decreed parole eligibility for murder and aggravated murder in 11 or 15 to 20 years respectively.

---

[8] *See* R.C. §2967.13 [Pre-1996 version, amended to read 15, 16 and 20 years].

[9] In 1996, judges assumed the power to end the prison term of a sentence.

STATEMENT OF THE CASE

This lawsuit began in state court on July 20, 2001 and contained both state and federal claims. On August 20, 2001, Defendants [hereafter *State*] sought removal to federal court. (R. 1-1, Notice of Removal, Apx. p. 133) Plaintiffs opposed removal. The District Court found that state and federal claims shared a common nucleus of operative fact. (R. 31, Order, Apx. p. 540) On March 18, 2002, the State's motion to remove was granted.

A Parole Board Guideline Manual (hereafter *guideline manual* or *manual*) is the source of offending policies and practices. Under terms in this manual, every offender receives a guideline assignment for their crime and a second guideline assignment for their criminal history. Every crime in the Ohio Revised Code can be matched to a guideline in this 93 page manual.

These guideline assignments are transferred to a matrix grid called the Parole Chart. Every square on this grid is a guideline range, defined by a maximum and minimum number of months. Four recidivism guidelines are aligned along the horizontal axis, with first time offenders on the nearest guideline. Offense of conviction guidelines appear on a vertical axis. Category 1 is for parole violators. Category 13 is for aggravated murder. To illustrate an upward departure, assume our fictional offender is convicted of voluntary manslaughter. In the manual, this crime engages category 9 and begins at 84 months or 7 years for a first time offender. If our fictional offender is given an upward departure to murder, this engages category 11 and begins at 180 months. Parole eligibility is postponed *at least* 96 months or 8 years.

Assignments for the crime and criminal history intersect on a square inside the grid. By consulting this grid, each offender can determine how much time they must serve before becoming eligible for parole. It is axiomatic that meaningful parole consideration only occurs after an offender enters this guideline. An upward departure bonds parole eligibility to a more distant guideline range, substantially postponing meaningful parole consideration and, in the process, renders the trial court minimum sentence meaningless and creates a new minimum sentence dictated by the Parole Board.

Upward Departures Violate 5th and 6th Amendments

From conception and contrary to a statement in the appellate opinion declaring otherwise, making upward departures in offense convictions was characterized as a federal claim.[10] (R 1, Complaint, ¶ 115 to ¶ 127, Apx. 232 – 240). Plaintiffs argued that this practice violates "substantive due process principles" and imposes prison time "when it has never been proven beyond a reasonable doubt that the inmate is guilty of this new offense." (R 1, Complaint, ¶ 127, Apx. pp.'s 0239 – 0240)

---

[10] *See* Appendix B-12 stating that Bad Faith was " an attempt to review, .. Their dismissed state law claims."

By December of 2002, both sides had filed dispositive motions and this case was decisional. On December 18, 2002, Ohio's Supreme Court decided its *Layne* decision. The rule of law announced in *Layne* altered previous existing thought regarding parole decision-making. In *Layne*, limits were placed upon the Parole Board's exercise of discretion for the very first time. Plaintiffs and the State's dispositive motions were never decided.

On January 13, 2003, the State filed a Motion to dismiss the claim for upward departures in offenses, stating that *Layne* rendered this claim moot. (R. 128, Motion to Dismiss, Apx. p. 99) The Parole Board's Chief of Quality Assurance submitted an affidavit which stated in pertinent part:

> "The OPB [Ohio Parole Board] stopped the practice of classifying offenders' offense behavior under the Parole Guidelines based on anything other than their offenses of conviction at

> approximately noon on December 18, 2002. It has not resumed that practice and it has no plans to do so." (R. 135, Reply, p. 7, Apx p. 740)

The District Court's Order was clearly influenced by this affidavit. (R. 138, Order, pp. 5-6, Apx. pp. 745-746) Plaintiffs' claim was declared moot. On account of *Layne's* impact, Plaintiffs' were granted leave to file an Amended Complaint. A schedule was set up for filing new dispositive briefs.

Upward Departures Continue despite *Layne* Decision

In March of 2003, the Parole Board responded to the *Layne* decision by issuing an interdelineated revision of its guideline manual, crossing out some paragraphs and co-mingling handwritten comments with existing text.[11] Provisions granting authority to make upward departures in the offense of conviction remained in force and read:

---

[11] A certified copy of this interdelineated revision of the guideline manual was made part of the record in *Wilkinson*, Docket No. 03-287.

"The guidelines set forth the customary range of time to be served before release for various combinations of offense (seriousness) and offender (risk of recidivism) characteristics. *The Parole Board may depart from the applicable guideline range for "good cause"* provided the specific written reasons for the departure are recorded and a copy given to the offender.

"The Parole Board intends that the guideline ranges apply to "heartland" cases, the typical cases that embody the conduct and circumstances that fall within the particular guideline range. *In an atypical case, a case to which a particular guideline linguistically applies but where the conduct or circumstances differ significantly from the norm in an important way, the Board may depart from the guideline range."* (R. 47, Appendix, Item D. p. 70, Apx. p. 627) [Emphasis added.]

The continuing validity of these terms coupled with other evidence convinced Plaintiffs that upward departures in offenses *would not* stop. In its Amended Complaint, Plaintiffs added a claim for *Bad Faith,* a reference to its roots planted in the State's false affidavit. The offending behavior for Bad Faith was the practice of issuing an upward departure in *offense of conviction* for conduct never admitted in a plea or proven to a jury. (R. 140, Amended Complaint, Apx. pp.'s 440 – 447)

Discovery of Second Kind of Upward Departure

The Parole Board has a practice of adding time for *aggravating factors.* (R. 47, Appendix, Item D, Apx. p. 614-615) Reduced to its fundamentals, *aggravating factors* are sentencing enhancements, which justify prison time beyond the crime's guideline range. This upward departure also remained in force and continued to read:

> "(a) *In General.* The Parole Board may render a decision outside the guidelines for good cause provided that the offender is furnished, in writing, with a specific explanation for such action. *It is*

> *in the Parole Board's discretion to render a decision above or below the guidelines provided that there exists an aggravating or mitigating factor(s) sufficient to warrant a decision and provided the specific reasons for the decision are adequately explained in the notice of the Parole Board's action..."* (R. 47, Appendix, Item D. p. 75, Apx. p. 632) [Emphasis added.]

This rule authorizes a parole panel to search for behavior embedded in the crime which they can criminalize and label an *aggravating factor*. In so doing, the Parole Board wields the authority of a prosecutor, jury and judge. The only nod to due process is an adequate explanation of the action *after* it is done. This *aggravating factor* catapults an offender to a higher guideline, postponing meaningful parole consideration and forcing the trial court's minimum sentence to yield to a new minimum sentence set by the Parole Board. Plaintiffs' Amended Complaint adds a new separation of power claim which also makes a seamless transition into a 14th, 5th and 6th Amendment violation. This new claim states.

"Instead of a parole decision, there is a sentence transition. At the conclusion of a first parole eligibility hearing, an inmate stops serving the time set by the sentencing judge and begins to serve a new sentence established by the parole board. This shift occurs as the inmate is slotted into the guideline range dictated by the New Guidelines. When this shift takes place, fixed ranges on a parole board chart take precedence over plea agreements and trial court recommendations." (R. 140, Amended Complaint, ¶ 82, Apx. pp.'s 416-417)

"...Mechanically adding time to every Old Law sentence without being required to show good cause or any cause at all places the Parole Board squarely in the sentencing business, thus usurping the function of a judge. This exercise of authority violates the Separation of Powers Doctrine." (R. 140, Amended Complaint, ¶ 86, Apx. p. 419)

Plaintiffs' Amended Complaint was filed on April 1, 2003. Claims grounded in state law were dropped. Only federal claims remained.

***Wilkinson* Prompts Indefinite Stay**

Reginald Wilkinson and William Dotson are both named Parties to this lawsuit. This lawsuit is the driving force which prodded the State to seek *en banc* review of *Wilkinson I* followed by Certiorari review. On March 25, 2004, the District Court was informed of a pending Supreme Court decision, *Wilkinson,* which could have a dispositive impact upon this case. The State's motion for an indefinite stay was granted on July 11, 2004. Plaintiffs entered an appearance in this Court and filed an Amici Curiae brief (R. 250, Notice, Apx. 118). From March 25, 2004 to April 27, 2005, the fate of this case shifted to the U.S. Supreme Court.

In *Wilkinson's* Petition for Certiorari, the State maintained that only two statutes are involved, the Civil Rights statute [42 U.S.C. § 1983] and the Habeas Corpus statute [28 U.S.C. §§ 2241 - 2254].[12]

---

[12] Petition for Writ of Certiorari, Docket No. 03-287, at pp.'s 2-3.

Plaintiffs' amici curiae brief ignored both statutes and focused exclusively upon constitutional issues. After setting out the three paragraphs just quoted for granting the Parole Board authority to do upward departures, Plaintiffs' brief stated.

> "In federal court, it would be unthinkable to apply a sentencing guideline suitable for attempted murder when the offender is guilty of assault. In Ohio, parole panels have authority to make upward departures of this kind, achieving a result that the State could not realize in court." [13]

In *Wilkinson,* this Court duly noted the presence of a constitutional anomaly. The following statement appears in its syllabus and the decision.

> "This Court's case law makes clear that the connection between the *constitutionality of the prisoners' parole proceedings* and release from

---

[13] Brief on behalf of 2,974 Former and Current Ohio Inmates and Named Plaintiffs in *Michael v. Ghee* as Amici Curiae, Docket No. 03-287, pp.'s 5-6.

> confinement is too tenuous here to achieve Ohio's legal door-closing objective."[14] [Emphasis added.]

On March 7, 2005, *Wilkinson* was decided in favor of Ohio's inmates. The indefinite stay was lifted and District Court proceedings continued.

Self Authenticating Proof of Upward Departures in Offenses

To support Plaintiffs' Bad Faith claim, a chart was submitted reflecting 21 Plaintiffs convicted of assault. (R. 61, Exhibits, Chart C, Apx. pp.'s 653 to 655) Four of these 21 convictions are jury verdicts. Plaintiffs expected to end up somewhere in the assault guideline. The Supreme Court has declared that a defendant has a substantial and legitimate expectation that they will be deprived of liberty only to the extent determined by a court, through imposition of a sentence reflecting judicial discretion.[15] Instead, every Plaintiff received an upward departure in offense.

---

[14] *Wilkinson*, 544 U.S. 74, 78 (2005).

[15] *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)

Ten class members had their assault conviction set aside. and they were found guilty of attempted murder. Five class members had their assault conviction yield to a rape conviction. Two class members had their assault convictions replaced with guideline placements for aggravated robbery. Two class members were found guilty of kidnapping. Finally, two class members were found guilty and placed in a guideline suitable for murder. The guideline for assault was left vacant. This all took place within a meeting lasting ten minutes or less.

The impact of upward departures is not inconsequential. The 7th guideline applies to a first time offender convicted of felonious assault and requires 48 to 60 months (i.e. 4 to 5 years). Attempted murder would place them in Category 9 and require 84 to 120 months (7 to 10 years). Rape and kidnapping engage Category 10 for a first time offender and requires 10 to 15 years. Murder for a first time offender is Category 11 and requires 15 to

20 years.[16] The guideline time for assault is being doubled and tripled.

Under Ohio's pre-1996 code, the conviction and minimum sentence were decided by a judge, not by a jury or by operation of law, and reflect the hard realities of evidence matched against the brutal ordeal of a trial. Plaintiffs were all found guilty of assault, *not* attempted murder, rape, aggravated robbery, kidnapping or murder. In overruling these judicial decisions, the Parole Board is acting *ultra vires*. Embedded in this exercise of discretion is the premise that the judge had no factual findings or legal reasons to sentence the defendant as they did. The Parole Board has no authority to act as overseer of courts and to change the decision of a judge.

An upward departure to a more severe crime places offenders in a higher guideline, substantially postponing parole consideration and significantly prolonging their minimum sentence. In the rule of law announced in *U.S. v. Booker,*[17] any fact that can prolong the duration of a prison sentence must be acknowledged in a plea or found true beyond a reasonable doubt by a jury. If the rule of law in *Booker* can constrain the discretion of judges, it can also constrain the discretion of a parole panel. These Parole Board upward departures will not be found in a plea or in a jury verdict. Upward departures in offenses clearly violate the 6th and 14th Amendments.

---

[16] *See* Guideline Manual, R. 47, Appendix, Item D, Apx. pp.'s 550 to 650; Guidelines Chart Apx. p. 558, Attempt, Article 102, Apx. p.565; Assault, Article 211, Apx. p. 564; Rape, Article 231 (A), Apx. p.569, Kidnapping Offenses, Article 221, at Apx. p. 567; Murder, Article 202, Apx. p. 561.

Empowering administrators to act as prosecutor, judge and jury, with authority to set aside a court verdict and impose their own conviction in a 10 minute proceeding containing none of the trappings of due process, clearly violates the 5th and 14th Amendments.[18] The inference of an embedded federal question is incontrovertible. The Parole Board Guideline Manual, certified copies of these 21 trial court judgments and these 21 parole decisions can all be entered into evidence without further proof that these documents are what they appear to be. The federal violation springing from this incontrovertible evidence is self authenticating.

---

[17] 543 U.S. 220, 243 (2005) [hereafter *Booker*].

[18] *See Joint Anti Fascist Refuge Committee v. McGrath,* 341 U.S. 123, 170 (1951) Justice Frankfurter concurring. (fairness can rarely be obtained in one-sided determination of facts decisive of rights) [hereafter *McGrath*].

Self Authenticating Upward Departures via Sentencing Enhancements

Under Ohio law, if an offender uses a weapon or the crime is driven by a reprehensible motive or purpose not normally contemplated within the statute, a Grand Jury can impose a *sentencing enhancement* which exceeds the statutory maximum term. Just like the crime, a sentencing enhancement must appear in the indictment and it must be acknowledged in a plea or proven to a jury before an offender can be ordered to serve this added time.

The Parole Board's *aggravating factors* bear a superficial similarity to sentencing enhancements. Conduct embedded or extraneous to the crime serves as its source. Unlike a sentencing enhancement, *aggravating factors* do not appear in an indictment and they are not admitted in a plea agreement or proven to a jury. Instead, these factors spring from two internal Parole Board sources. (1) *Aggravating factors* are felony-specific and can be found in the manual under specific crimes. (2) *Aggravating factors* are case-specific, in that they can be resurrected from a file and imposed at a hearing based upon any behavior a parole decision-maker deems relevant.

Felony-Specific Aggravating Factors

Rape under Ohio's pre-1996 penal code applies when an offender has engaged in sex by: (1) impairing the other person's judgment with any drug or intoxicant; (2) the other person is under age 13; or (3) the other person's ability to consent or resist is impaired because of a mental or physical condition or due to advanced age.[19] At time of sentencing, every judge went through these statutory elements. At the hearing's conclusion, the record reflected the specific conduct supporting the rape conviction.

In the Parole Board's manual, *rape* reads as follows (R. 47, Appendix, Item D, Apx. p. 569):

> "Use the greatest applicable category:
>
> (A) Category 10 (i.e. 10 – 15 years) if

---

[19] Ohio R.C. § 2907.02 (pre-1996 version) Rape [hereafter *codified* rape].

> (1) serious bodily injury results;
>
> (2) the victim is raped by more than one offender;
>
> (3) the victim is less than 16 years of age; or
>
> (4) the victim is kidnapped to facilitate the offense
>
> (B) Category 9 (i.e. 7 – 10 years) in any other case."

Paragraph (A) is a list of *aggravating factors*. Paragraph (B) declares the guideline range matching a *rape* conviction. Hundreds of Plaintiffs have been convicted of rape, but a review of their parole decisions reveals that no one has been placed in Category 9. On average, their assigned guideline *begins* at 12.7 years. (R. 196, Plaintiffs' Exhibits, Apx. p. 815) Category 9 *stops* at 10 years. 12.7 years places them mid-way through Category 10. On average, their actual time served is 15.6 years, placing them in Category 11 (i.e. 15 to 20 years). Everyone convicted of rape is getting a one or two range upward departure in their offense of conviction. (R. 196, Plaintiffs' Exhibits, Apx. p. 816) The State has never challenged these survey results.

Plaintiffs with rape convictions have all been indicted, prosecuted and found guilty *by the Parole Board* of a sentencing enhancement. Instead of receiving meaningful parole consideration in category 9, they must enter Category 10 which requires 10 to 15 years for a first time offender.

In the code version of rape, serious bodily injury and kidnapping are nowhere to be found. If such facts applied, a perpetrator would be charged with a second crime for assault or kidnapping. The age of a minor is defined as 12, not *less than 16*. It was statutorily irrelevant if a victim was raped by more than one person. In such a case, each perpetrator would be individually charged with this crime. *Not a single aggravating factor listed in Paragraph (A) of the manual refers to conduct contemplated for the crime of rape.*

Aggravating factors invented by the Parole Board have broadened the scope of offensive behavior attached to rape. This extraneous conduct justifies and dictates an upward departure in offense of conviction. Plaintiffs' amended Complaint states, "*...mechanically adding time to every Old Law sentence without being required to show good cause or* *any cause at all places the Parole Board squarely in the sentencing business..."* The codified version of rape bows to a reconfigured version containing conduct never contemplated for this crime, created and applied by the Parole Board.

* * * * *

Culpable conduct for Aggravated Vehicular Homicide is recklessly causing a death while operating a motor vehicle.[20] If the driver is under the influence of alcohol or drugs, their driving permit is permanently revoked. The guideline matching this conviction is Category 4, requiring 18 to 24 months in prison for a first time offender. This is the conduct and these are the sanctions contemplated for this crime.

In the guideline manual, *aggravating factors* connected to this crime include: (1) acquiring 12 points for driving infractions in the prior two years, (2) eluding police, (3) driving with a revoked or suspended license and (4) driving with an alcohol content of .20 or higher. (R. 47, Appendix, Item D, Apx. p. 562) Driving infractions for 12 points will dictate a three range upward departure, increasing the prison term to 4 or 5 years.[21] Proof of the remaining *aggravating factors* justifies a four range upward departure and requires 5 to 7 years of prison time. (R. 47, Appendix, Item D, Apx. p. 562)

---

[20] Ohio R.C. § 2903.06 [pre-1996 version].

Accumulating 12 points for driving infractions is irrelevant to an Aggravated Vehicular Homicide conviction. Eluding police and driving with an invalid license would support a finding of recklessness. This conduct is already contemplated by terms in the statute. Driving under the influence of alcohol is relevant and sanctioned through permanent loss of a driving permit. None of the Parole Board's *aggravating factors* are truly aggravating factors. Motor vehicle violations, typically settled with fines, become injected with steroids so they can justify 3 to 5 years of added prison time. These aggravating factors are either statutorily irrelevant (i.e. the 12 points) or already contemplated in the statute's terms and sanctioned by its sentence.

In Plaintiff's Amended Complaint, we stated that *there is a sentence transition*. Like the Parole

---

[21] See Parole Board Guideline Manual, Article 205 (B).

Board treatment of rape, the guideline manual has redefined the offensive behavior applicable to Aggravated Vehicular Homicide. In the process, the prison sentence has been transformed. Terms in a manual have overruled and taken precedence over the legislature's penal code and the Judiciary's factual findings, justifying and dictating an upward departure in the offense of conviction. These aggravating factors do not appear in an indictment and they have not been admitted in a plea or proven to a jury. Nevertheless, meaningful parole consideration is placed on hold until the matching guideline time has been doubled or tripled.

The Parole Board's manual and Ohio's penal code can be entered into evidence without further proof that these documents are what they appear to be. Just a plain reading of the manual validates differences with these penal statutes. Evidence attesting to an embedded federal question for Aggravated Vehicular Homicide, rape and numerous other crimes is incontrovertible. The federal violation springing from this incontrovertible evidence is self authenticating. Pursuant to *Booker* and *McGrath*, the same reasoning applicable to upward departures in offenses applies with equal force to the Parole

Board's practice of issuing upward departures for aggravating factors.

Case-Specific *Aggravating Factors*

The sharpest edges of an indictment are often polished smooth through negotiated plea agreements. Prejudicial facts carrying a sentencing consequence, such as brandishing a deadly weapon, can drop out to avoid a trial. Dropped charges from indictments are routinely resurrected and converted into an *aggravating factor*. Unsworn statements from victims offering ad hoc information the Parole Board is no position to appraise constitute a second source for aggravating factors. Any information in a file that can justify additional time, irregardless of its source or its credibility, can become an aggravating factor.

Following the Ohio Supreme Court's *Layne* decision, field 9 of the Ohio Parole Board Decision Sheet was amended to read:

> 9. A. Circumstances related to the offense(s) of conviction, including crimes that did not result in conviction, and *any other factors*

> *the APA deems relevant.* [Emphasis added.]
>
> B. Based on these additional factors, an additional __ months should be served from the date of this hearing before release /next hearing. (R. 201, Excerpted Exhibits, Apx. pp. 865-866).

Any other factors the APA deems relevant opens a door that can allow *any* ad hoc conduct to enter and evolve into an aggravating factor. The decision sheet – and not the manual – serves as the source for this conduct.

Impact of Upward Departures upon Plaintiffs

Two surveys were taken to ascertain the prevalence of upward departures at two points in time. Results were surprisingly consistent. The first survey examined decisions from September 5, 2003 – when all reforms prompted by *Layne* had been installed – to March 31, 2005. (R. 312, Reply Charts, Apx. p. 1475). This survey found that seven out of ten Plaintiffs were either serving time in an elevated guideline, destined to serve time in an elevated guideline by their last parole decision or they were paroled after serving time in an elevated guideline. A second survey was taken of decisions from June 1, 2005 to August 11, 2005. (R. 313, Reply Charts, Apx. p. 1481). In this survey, 72.6% of Plaintiffs were destined to serve time in an elevated guideline range. The highest component (i.e. 42.4%) received a departure "for any factors the APA deems relevant." The findings on these charts were never challenged by the State.

District Court Findings and Rulings

On February 1, 2006, the District Court issued its decision. Bad Faith and Separation of Powers' claims were dismissed pursuant to Fed.R.Civ.P 12(b)(6). Regarding Separation of Powers, the District Court stated:

> "The alleged violation of separation of powers relates to the relationship between the branches of Ohio's government: plaintiffs' contention being that the executive, through the APA (Adult Parole

> Authority), is taking over the job of the state judiciary. Any alleged violation concerns only state law. Thus, § 1983 is inapplicable." (R. 345 Order, p. 14, Apx. Pg. 516)

The District Court considered the fait accompli of a Parole Board taking over jobs of judges and held that these acts cannot rise to a § 1983 civil rights action.

With regard to Bad Faith, the District Court ruled:

> "In general terms, this cause of action asserts that the APA is improperly disregarding an Ohio Supreme Court ruling. This is only a state law issue, to which § 1983 does not apply." (R. 345 Order p. 14, Apx. Pg. __)

The injury inflicted by a refusal to follow an Ohio Supreme Court decision was similarly viewed as a matter inadequate to state a § 1983 claim.

Appellate Court Proceedings and Findings

Plaintiffs appealed to the Sixth Circuit. Counsel for the State admitted that upward departures did not stop in 2002, but argued that this was harmless. (Appellees' Brief, pp.'s 21, 53-54) On August 10, 2007, the District Court's order was affirmed. Regarding Separation of Powers, the appellate decision states:

> "In their third cause of action, entitled "Separation of Powers," plaintiffs claim that because the parole board has the discretion to retain inmates past the expiration of their minimum sentence date, the parole board exceeds the scope of its state constitutional powers." [22]

Plaintiffs actually stated that guidelines are pitched higher than the minimum sentence, and had the effect of rendering the trial court's minimum sentence meaningless, and instituting its own minimum sentence and statutory date of parol eligibility in its place. (R. 140, Amended Complaint, Apx. pp.'s 417-418)

---

[22] *Michael v. Ghee*, 498 F. 3rd 372, 375 (6th Cir. 2007).

The Sixth Circuit affirmed the dismissal of Bad Faith as follows.

> In their fourth cause of action, entitled "Bad Faith," plaintiffs claim that the parole board has breached its duty to give every inmate a meaningful parole hearing. Plaintiffs contend that *"[p]romulgating [the] New Guidelines and Policy 501-36 to extend the sentences of Old Law inmates, thereby extending their own careers and delaying the eventual demise of the Parole Board, constitutes an ulterior motive."* Each cause of action was brought pursuant to 42 U.S.C. § 1983. [Emphasis added.]
>
> "The district court properly dismissed these claims." [23]

The Sixth Circuit has selectively extracted and partially quoted one paragraph from Bad Faith in the Amended Complaint. This paragraph is preparing a foundation for moral obliquity, one element of Bad

---

[23] *Michael v. Ghee*, 498 F. 3rd 372, 375 (6th Cir. 2007).

Faith.[24] (R. 140, Amended Complaint, Apx. p. 439). A paragraph bonded to one element is mischaracterized as the entire claim. In the process, Plaintiffs' Bad Faith claim is rendered unrecognizable. Justification for dismissal relies entirely upon this nonsensical misrepresentation.[25]

More fundamentally, Ohio's Parole Board has been striving mightily to bury or blur the appellate decisions which it is openly defying. In this regard, the Sixth Circuit's treatment of Bad Faith must embody the deliverance of their most fervently sought prayers. The issue of whether a one sentence reference in *Layne*, permitting a parole panel to consider matters beyond the conviction, also allowed an upward departure was addressed by a Franklin County appellate court in *Ankrom v. Ohio Adult Parole Authority* [hereafter *Ankrom*]. As an indication of the interest in this case, six amicus briefs were submitted. In a 32 page unanimous decision, the Parole Board was told that it cannot make upward departures in offenses. (R. 262, Exhibit A, Apx. pp.'s 1391 - 1422). The panel went further, and found that this conduct violated the Separation of Powers Doctrine. (R. 262, Exhibit A, Apx. pp.'s 1419-20). The Sixth Circuit's treatment of Bad Faith states:

---

[24] The deleted portion reads, *This also qualifies as moral obliquity.*

[25] The Amended Complaint was written in early 2003, before the Parole Board's intransigence toward an upward departure was revealed. In 2008, the Parole Board's failure to follow Ohio Supreme Court authority, coupled with schemes to camouflage its upward departures which continue to this day, might be sufficient to satisfy the moral obliquity element of Bad Faith.

> "...pursuant to *Layne,* the OAPA could have considered other factors and concluded that the prisoner's guideline range did not adequately serve the interests of society." (Appendix B-13)

In so ruling, the Sixth Circuit has resurrected an argument raised and categorically rejected in *Ankrom*, and provided a reported precedent which totally changes the meaning of *Layne*.

EN BANC REVIEW

On August 22, 2007, the Separation of Powers and Bad Faith claims were submitted for *en banc* consideration. All other federal claims were dropped. On December 21, 2007, this *en banc* appeal was denied. At the present time, 1,478 Plaintiffs are still in prison and subject to these rules. Plaintiffs petition this Court for a review of the Sixth Circuit's dismissal of our Separation of Powers and Bad Faith claims.

REASONS FOR GRANTING REVIEW

I. In states where the Parole Board is ordered to place the public's safety first, the practice of overruling a trial court finding or judgment is endemic and deeply rooted in parole decision-making, and significantly delays parole eligibility, thereby prolonging the minimum sentence and forcing offenders to serve their prison time under more severe terms than contemplated in their judgment.

One basis for granting certiorari review occurs when a district or an appellate court sanctions a departure from the accepted and usual course of judicial proceedings such that, this Court's exercise of supervisory power is justified. By refusing to address the merits of Plaintiffs' Bad Faith claim, the District and Appellate Courts have sanctioned just such a departure. Ohio's Parole Board has granted itself the power to be the omnipotent and superior arbiter of justice over offenders subject to its regime. This position is articulated in its guideline manual, which states:

> "In an atypical case, a case to which a particular guideline *linguistically applies* but where the conduct or circumstances differ significantly from the norm in an important way, the Board may depart from the guideline range." [Emphasis added.]

In a parole context, where guidelines are applied by hardened correctional staff functioning in a hierarchal environment where punishment is exalted and understanding is repressed, decisionmakers clearly lack the structural insulation from prosecutorial influence to insure the indispensable elements of neutrality and detached objectivity which must accompany such unbridled discretion. Permitting a parole panel to exercise this kind of latitude both invites and nurtures a steady stream of unthinkable abuses to our usual and accepted judicial proceedings. The formalities of a court proceeding, culminating in a judgment building upon affirmative findings of facts, are being routinely subordinated to an unsworn statement of a victim or to an allegation dropped from an indictment. Both cases are business as usual on a parole panel and constitute such a departure as to deserve review.

Parole records are cloaked in secrecy. Counsel cannot be present. Parole decisions become arbitrary when the current offense becomes something other than the crime of conviction. Like the deliberations of a *star chamber*, parole practices are arbitrary, draconian, spring from a record no one else can see and their decision cannot be reviewed. Unbridled discretion of this kind was never intended to apply to a judge's work product.

Ohio is not alone. Plaintiffs' counsel initiated a second class action lawsuit in Texas challenging practices and policies of the Texas Board of Pardons and Paroles. This litigation was commenced on December 5, 2005 and dismissed pursuant to Fed.R.Civ.P. 12(b)(6) on August 28, 2007. [26] If a deadly weapon is used in Texas, the first 50% of a sentence must be served day for day.[27] In contrast, parole eligibility follows after 10% has been served in calendar time if no weapon is used. One method for prolonging the minimum sentence consists of adding the deadly weapon specification even though a trial court judge has found that no deadly weapon was used.

To prove this claim, *certified copies* of judgments were submitted for a Texas inmate stating that the Court did not make an affirmative finding that a deadly weapon was used. Conversely, an internal file stating that injuries were inflicted was also submitted, with an affidavit from a prison clerk certifying the accuracy of this internal file. Finally, the parole decision was submitted, invoking a deadly weapon specification as grounds for denial. Like Ohio, the Texas Parole Board elevated a self serving internal memo over the finding of a judge, permitting the Parole Board to substantially prolong the minimum sentence. The Texas trial court refused to see the embedded federal issue and this claim is now being appealed.[28]

---

[26] *Brasfield v. Owens*, Case No. A-05-CV-1009 SS (U.S. District Court for Western District of Texas, Austin Division). On appeal, this is *Baca v. Owens*, Case No. 07-51148 (Fifth Circuit Court of Appeals).

[27] *See* V.T.C.A. Tex. Gov. Code § 508.145(d). This applies to crimes listed under § 3(g) of Article 42.12 of the Texas Code of Criminal Procedure.

Plaintiffs' counsel brought a class action against the Pennsylvania Board of Probation and Parole. [29] Crimes involving possession or use of a deadly weapon engage the Deadly Weapon Enhancement matrix and carry a sentencing consequence, resulting in a longer minimum sentence of one or two years.[30] Like Texas, Pennsylvania's Board will add this enhancement, even though this evidence was considered and rejected by the trial court. Counsel for the Pennsylvania Attorney General acknowledged this practice and defended it as proper under their authority to protect the public's safety. This was also dismissed by the Pennsylvania District court for failure to state a claim.

---

[28] This claim was dismissed for failure to show that one branch of the federal government infringed upon another branch of the federal government. The existence of a federal separation of power claim was submitted by the Texas Attorney General. This claim is not in our complaint.

[29] *Curley v. Pa. Board of Probation and Parole*, Case No. 07-145, U.S. District Court for Western Pennsylvania, Erie Division.

A. Defying judicial authority is not out of character for a Parole Board. These agencies are given broad latitude in exercising discretion, and they are accustomed to exercising this authority without any checks and free of any review. Parole Board's have muscled their way into main stream judicial proceedings, and they are making decisions functionally equivalent to a judge. This Court's exercise of supervisory power is further justified by a need to remove the

---

[30] *See* 204 Pa. C.S.A. 303.10(a) (1) and (2) and 204 Pa. C.S.A. 303.17.

Parole Board from areas reserved exclusively to judges.

There is a second departure from the usual course of judicial proceedings which justifies the exercise of this Court's supervisory power. Parole decisions rarely see the light of day. These violations occur below the radar screen, where flagrant abuses are not just capable of evading detection; they *anticipate* no detection. After the Ohio Supreme Court decided *Layne*, the choice was left to obey the law or disobey Ohio's Supreme Court. The State made a conscious decision to disobey the law.[31] Today, Ohio's Parole Board can act with impunity, without fear of the judiciary and in open defiance of the state's constitution. This state of affairs is intolerable.

In the latest session of the Texas Legislature, an important statute related to parole was amended. In the process, the Texas Parole Board's discretion has been constrained and they are being held more

---

[29] The appellate appendix consisted of four volumes and included numerous Ohio Parole Board decisions reflecting upward departures.

accountable for their decisions.[32] Counsel's law firm has initiated a second Texas law suit to enforce this new law.[33] Thirty parole decisions have been received since this new law went into effect September 1, 2007, and there has been no sign of compliance. Furthermore, the Parole Board has made no secret of its contempt for this new statute and its intent to continue conducting business as usual.

The announcement of a rule of law from this Court will compel district courts to address this ubiquitous problem and restore the authority of judges. Without a clear statement from this Court, this process will flounder for many years. Both lower court rulings are published and carry *precedential authority*. State attorneys are proving themselves resourceful at modifying claims beyond recognition and converting them into non-issues which can be

---

[30] See V.T.C.A., Gov. Code § 508.144 (b). This statute now requires a written report with details when an inmate is taken out of their guideline range, and a copy of these reasons are to be handed to the inmate. This language sets up a presumption in favor of parole which must be overcome, thereby constraining discretion.

[31] Named Plaintiffs Group v. Rissi L. Owens, et al, Case No. 1:07-CV-00962-SS in the Western District of Texas, Austin Division.

readily dismissed. Both lower courts have dodged the merits.

B. Parole decision-making is fueling increasing disillusionment with our criminal justice jurisprudence.

Educators, pastors, parents and prison professionals are at a loss to understand how a judge's ruling can be overruled by a parole panel. When parole is denied for a reason that cannot be reconciled with a trial court judgment, years of rehabilitative work can be instantly reversed. Because parole panels have muscled their way into mainstream judicial decision-making, disillusionment is not confined to post-conviction parole matters. Disillusionment has spilled over into the entire criminal conviction process.

C. This case is particularly well suited for formulating and announcing a new rule of law applicable to the exercise of Parole Board discretion and their

treatment of trial court judgments and findings.

The Ohio Parole Board Manual reduces to writing the Parole Board's authority to overrule judges and modify penal statutes. The State has not and cannot deny these policies and practices. In choosing a case for announcing a new rule of law, it is important that the facts setting up this claim are clear and incontrovertible. Ohio provides just such a platform. If a case of this kind arose in Texas or Pennsylvania, it would not be self authenticating. Much of the proof would consist of case-specific facts. Much of the evidence would consist of policies *as applied* instead of policies *as written* and *as applied.*

Further, these Ohio policies remained in force from March 1, 1998 until July 1, 2007, and continue in an unwritten but *as applied* form to this day. There is steadfast adherence to these policies, even after Ohio's highest court ordered its Parole Board to do otherwise.

II. In states where the Parole Board is ordered to place the public's safety first, inventing and treating

aggravating factors as sentencing enhancements is also endemic and deeply rooted in parole decision-making.

By refusing to address the merits of Plaintiffs' Separation of Powers claim, the District and Appellate Courts closed their eyes to evidence proving that parole panels change the punishment attached to an offense by adding time beyond the conviction guideline for extraneous conduct and for conduct already contemplated by the crime. In so doing, the lower courts are sanctioning another departure from the accepted and usual course of judicial proceedings of such magnitude as to justify an exercise of this Court's supervisory power.

Parole panels do not view the punishment ordered by a judge as dispositive. By itself, this constitutes a departure from the accepted and usual course of judicial proceedings. *Aggravating factors* add time *beyond* the conviction's guideline range, effectively reconfiguring the prison time for a crime. In so doing, parole panels are acting *ultra vires*. This subjective process for adding time for conduct never contemplated by a trial court judge constitutes still another departure from the accepted and usual course of judicial proceedings, worthy of an exercise of this Court's supervisory power.

A. Accumulating 12 points for driving infractions is not a crime in Ohio. Making this behavior an *aggravating factor*, and using this conduct to justify two or three years of added prison time amounts to an amendment of the Ohio penal code. Similarly, the authority to color any conduct whatsoever as an aggravating factor, raises the prospect of the tail waging the dog. These are further departures justifying an exercise of this Court's supervisory power.

Once again, Ohio is not alone in reconfiguring the penal code. In Texas, the penal code is irrelevant in determining the current crime's severity level. National Crime Information Center Codes and Offense Descriptions [hereafter N.C.I.C. Codes] are used instead. These codes are identifiers, and they have been created to accommodate police looking for outstanding warrants after making a traffic stop. These codes are not penal statues, and they make no pretense of being a statute. N.C.I.C. codes, as issued by the National Crime Information Center, do not have severity values attached. The Texas Parole Board has a guideline committee which affixes a severity value to each code. By inserting a severity rating of its own making for each N.C.I.C. code, the Texas Parole Board is substituting its own penal provisions for the penal code of the legislature, and these scores are dictating 50% of a parole candidate's guideline score.

Just as the Ohio Parole Board has assumed the right to be omnipotent and superior to judges, they have also taken this same stand with regard to the legislature. Ohio is not alone in taking this stance. Criminal conduct becomes whatever a parole panel declares it to be. It would be hard to imagine a further departure from our accepted and usual course of judicial proceedings than these practices.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant certiorari and review Plaintiffs' Bad Faith and Separation of Power claims, both of which morph into violations of the 5th, 6th and 14th Amendment.

Respectfully submitted,

Norman L. Sirak
4974 Higbee Avenue – Suite 203
North Canton, Ohio 44718
Phone (330) 493 1947
Fax (330) 493 7851

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Petition for Rehearing,
filed 12/21/07 .... A1 - A2

Opinion,
filed 08/10/07 .... B1- B41

NORTHERN DISTRICT OF OHIO FILINGS:

Order,
filed 02/01/06 .... C1 - C24

Judgment,
filed 02/01/06 .... D1 - D1

Excerpt of Plaintiffs' Exhibits,
Reply Chart [Exhibit N],
filed 09/19/05 .... E1 - E1

Excerpt of Plaintiffs' Exhibits,
Reply Charts Exhibits A,
filed 09/19/05 .... F1 - F1

Excerpt from Exhibit A, *Ankrom*
(pp. 29-30) of Defendant's Response
to Motion to Lift Stay
filed 04/11/05 .... G1 - G4

APPENDIX, CONTINUED

Plaintiffs' Exhibits,
Vol. III [Excerpt of Ex.45],
filed 12/08/03 . . . . H1- H2

Excerpts of Plaintiffs' Exhibits
[Charts and Graphs; Ex. II & III],
filed 12/08/03 . . . . I1 - I2

Plaintiffs; Exhibits to Motion for
Summary Judgment [[Ex.C],
filed 07/02/02 . . . . J1 - J8

Appendix to Motion for Summary
Judgment [Excerpt of Ex.D]
Ohio Parole Board Guideline Manual,
filed 07/02/02 . . . . K1 - K11

◆

No. 06-3595

UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

DENNIS MICHAEL, ET AL. ,
Plaintiffs-Appellants,
v.
MARGARETTE T. GHEE,
CHAIRPERSON, OHIO ADULT
PAROLE AUTHORITY, ET AL., .
Defendants-Appellees.

ORDER

BEFORE: MOORE and GRIFFIN, Circuit Judges; and MCKINLEY,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

*Hon. Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS MICHAEL, et al.,
Plaintiffs-Appellants,

v. No. 06-3595

MARGARETTE GHEE, Chairperson,
Ohio Adult Parole Authority, et al.,
Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of Ohio at Toledo.
No. 01-07436-James G. Carr, Chief District Judge.

Argued: June 1,2007
Decided and Filed: August 10, 2007

Before: MOORE and GRIFFIN, Circuit Judges;
McKINLEY, District Judge.*

COUNSEL

ARGUED: Leonard W. Yelsky, YELSKY & LONARDO, Cleveland, Ohio, for Appellants. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL,

---

* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

Columbus, Ohio, for Appellees. ON BRIEF: Leonard W. Yelsky, Norman L. Sirak, YELSKY & LONARDO, Cleveland, Ohio, for Appellants. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

OPINION

GRIFFIN, Circuit Judge. Plaintiffs, inmates in Ohio correctional facilities who were sentenced prior to Ohio's enactment of a revised sentencing system on July 1, 1996, appeal the district court's order granting defendants' motion for dismissal and for summary judgment. Plaintiffs argue that the district court erred in dismissing their state law claims, and in entering summary judgment in favor of defendants on plaintiffs' claims arising under the Due Process, Equal Protection, and Ex Post Facto Clauses of the Constitution. For the reasons set forth below, we affirm.

I.

Under Ohio's former sentencing law, Ohio inmates were given an indeterminate sentence comprised of a minimum and a maximum sentence. An inmate became eligible for parole after serving his or her minimum sentence, minus credit for good behavior. Parole decisions were delegated to the Ohio

Adult Parole Authority ("OAPA"). It determined when release was appropriate for each inmate. In 1995, Ohio adopted a new sentencing system for crimes committed after July 1, 1996. *See* OHIO REV. CODE §5120 *et seq.* Under the new law, indeterminate sentences were abandoned in favor of fixed terms of incarceration determined by the defendant's presiding judge. The new system does not apply retroactively to Ohio inmates sentenced under the former sentencing scheme. OHIO REV. CODE §5120.021(A).

In 1998, the OAPA adopted guidelines designed to guide the discretion of parole officers making release determinations for Ohio inmates sentenced prior to July 1, 1996. The guidelines are similar to the guidelines used by the United States Parole Commission, using two factors to determine how long a prisoner should be incarcerated before parole: (1) the seriousness of the inmate's crime, and (2) the "risk of reoffense," based on the inmate's prior criminal conduct and performance on probation and parole. The presumptive amount of time an inmate serves is determined by finding the intersection on a grid between the inmate's offense category and his or her risk of reoffense. Parole officials, however, retain discretion to depart from the guidelines, but may not retain an inmate beyond the maximum sentence. *See* OHIO REV. CODE §2967.03 (describing the OAPA's broad discretionary powers).

Plaintiffs filed this lawsuit in the Lucas County (OH) Court of Common Pleas on July 20, 2001, challenging the OAPA's practices, procedures, and proceedings.[1] In their amended complaint brought pursuant to 42 U.S.C. §1983, plaintiffs contend that the lack of retroactivity of the new sentencing scheme and the implementation of the 1998 guidelines violate the Ex Post Facto, Due Process, and Equal Protection Clauses of the Constitution, as well as various provisions of state law.

---

[1] Although plaintiffs intended this case to be a class action lawsuit, their motion for class certification was still pending when the district court granted the State's motion for dismissal and summary judgment. Thus, before this court, plaintiffs must show that a genuine issue of material fact exists with regard to each named plaintiff.

Defendants, various members of the OAPA, and the Ohio Parole Board (collectively "defendants" or "the State") removed this case to federal court. On February 1,2006, the district court granted the State's motion for dismissal and summary judgment. The court held that 42 U.S.C. §1983 does not provide for a cause of action for violations of state law and, accordingly, dismissed plaintiffs' state law claims pursuant to FED. R. CIV. P. 12(b)(6). The court entered summary judgment in favor of the State on plaintiffs' federal constitutional claims, holding that plaintiffs' due process claims fail for lack of a liberty interest, that plaintiffs' equal protection claims fail under a rational basis review, and that the Ex Post Facto Clause does not apply to the OAPA's adoption of the 1998 guidelines. This timely appeal followed.

II.

First, plaintiffs challenge the district court's dismissal of their four causes of action that arise under Ohio state law. The district court dismissed each of these causes of action for failure to state a claim, pursuant to FED. R. CIV. P. 12(b)(6), because 42 U.S.C. § 1983 does not provide relief for a violation of state law. In so holding, the district court relied on this court's opinion in *Huron Valley Hosp.*, *Inc. v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989). Plaintiffs dispute the district court's reliance on *Huron Valley*, and argue that the court's dismissal runs counter to the Supreme Court's holding in *Wilkinson v. Dotson*, 544 US. 74 (2005). Plaintiffs' arguments are without merit, and the district court's dismissal of claims one through four is affirmed.

In their first cause of action, entitled "Abuse of Discretion," plaintiffs claim that the new sentencing guidelines were never submitted to the Joint Committee on Agency Rule Review pursuant to OHIO REV. CODE §111.15(D) and that the State did not satisfy the procedure for adopting the guidelines as set forth in OHIO REV. CODE §119.03.

In their second cause of action, entitled "Arbitrary and Capricious Decision Making," plaintiffs cite OHIO ADMIN. CODE 5120: 1-1-07, and claim that "[r]endering decisions without fully disclosing eligibility criteria is akin to deviating from fixed rules and rendering decisions predicated upon unknown rules. This practice constitutes arbitrary and capricious decision-making." Under this cause of action, plaintiffs claim further that Policy 501-36, which the OAPA adopted on December 22,2000, and

- argues plaintiffs - makes consideration of the factors set forth in OHIO ADMIN. CODE 5120: 1-1-07(C) discretionary, contravenes OHIO REV. CODE § 2967.03.

In their third cause of action, entitled "Separation of Powers," plaintiffs claim that because the parole board has the discretion to retain inmates past the expiration of their minimum sentence date, the parole board exceeds the scope of its state constitutional powers.

In their fourth cause of action, entitled "Bad Faith," plaintiffs claim that the parole board has breached its duty to give every inmate a meaningful parole hearing. Plaintiffs contend that "[p]romulgating [the] New Guidelines and Policy 501-36 to extend the sentences of Old Law inmates, thereby extending their own careers and delaying the eventual demise of the Parole Board, constitutes an ulterior motive." Each cause of action was brought pursuant to 42 U.S.C. § 1983.

The district court properly dismissed these claims. "Section 1983 ... authorizes courts to redress violations of 'rights, privileges, or immunities secured by the Constitution and [federal] laws' that occur under color of state law. 'The statute is thus limited to deprivations of federal statutory and constitutional rights. It does not cover official conduct that allegedly violates state law.'" *Neinast v. Bd. of Trs. of the Columbus Metro. Library*, 346 F.3d 585,597 (6th Cir. 2003) (*quoting Huron Valley Hosp.*, 887 F.2d at 714). In the amended complaint, plaintiffs have invoked only state statutory authority for each of these claims.[2] On appeal, plaintiffs have not identified any federal law or constitutional provision that is implicated by these claims. In short, plaintiffs have not offered any recognized argument that the district court erred in construing these claims as state claims.

Nevertheless, plaintiffs argue that the district court's reliance on *Huron Valley* is misplaced. Plaintiffs contend that *Huron Valley* stands for the proposition that a plaintiff may properly challenge an established state procedure pursuant to 42 U.S.C. §1983. Plaintiffs are correct that they may raise a challenge to an established state procedure pursuant to §1983, but only to the extent that the challenge invokes federal statutory or constitutional rights. In *Huron Valley*, we noted explicitly that §1983 may not be used as a vehicle to challenge "official conduct that allegedly violates state law." *Huron Valley*, 887 F.2d at 714. Thus, *Huron Valley* allows plaintiffs to raise their due process claim through §1983; it does not provide that plaintiffs have stated a viable claim under §1983 in their allegations of violations of Ohio state law.

---

[2] Plaintiffs assert that the defendants' "arbitrary and capricious decision-making" also constitutes a violation of the Due Process Clause. However, plaintiffs have also included a separate due process cause of action that involves essentially the same conduct.

Likewise, the Supreme Court's consideration of the revised Ohio parole procedures in *Wilkinson v. Dotson*, 544 US. 74 (2005), does not support plaintiffs' position. In *Dotson*, the Court held that state prisoners challenging the constitutionality of state parole procedures are not limited to seeking relief exclusively under the federal habeas corpus statutes, but may also file their challenge pursuant to §1983. *Dotson*, 544 U.S. at 82. However, *Dotson* involved federal constitutional challenges to the Ohio parole procedures only and is silent as to whether state prisoners may raise state statutory and constitutional claims under §1983. *Id.* at 76.

Plaintiffs also argue that the district court erroneously relied upon evidence offered by defendants to rebut plaintiffs' separation-of-powers claims. In dismissing plaintiffs' state law claims, however, the district court did not refer to any evidence offered by defendants. Rather, it found that each cause of action was an allegation solely under state law that may not be brought pursuant to 42 U.S.C. §1983. Therefore, plaintiffs' argument is without merit, and the district court's dismissal of these claims is affirmed.

III.

Plaintiffs also challenge the district court's dismissal of their bad faith claim. On December 18, 2002, the Ohio Supreme Court decided *Layne v. Ohio Adult Parole Authority*, 780 N.E.2d 548 (Ohio 2002). Prior to *Layne*, the OAPA calculated a prisoner's parole guideline range by considering all of the circumstances surrounding the prisoner's offense(s), including, for example, convictions for which the prisoner had been acquitted or charges that had been dropped pursuant to a plea agreement. *Id.* at 550.

The *Layne* court concluded that "the [O]APA must assign an inmate the offense category score that corresponds to the offense or offenses of conviction." *Id.* at 555. The *Layne* court explained further, however, that once the OAPA correctly calculates the prisoner's parole guideline range, the OAPA "still retains its discretion to consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors the [O]APA deems relevant." *Id.*

Defendants in this case have argued that a number of plaintiffs' claims were resolved by *Layne* and were therefore rendered moot. Defendants submitted an affidavit from Richard Spence, Chief of Quality Assurance for the Ohio Parole Board, stating that the OAPA began calculating offense category scores pursuant to the instructions of *Layne* on the date that *Layne* was decided, December 18, 2002. Defendants moved for dismissal of those aspects of plaintiffs' claims that relied on the OAPA's calculation of the parole guideline range, and on March 24,2003, the district court dismissed those claims. Plaintiffs have not appealed that decision.

On April 1, 2003, plaintiffs filed an amended complaint. Most of plaintiffs' amended complaint repeated claims raised in their original complaint, but plaintiffs added claims to one cause of action: "Bad Faith." Plaintiffs alleged that Spence's affidavit was false and described a number of individual plaintiffs who were not released on parole, despite having served more time in prison than was dictated by a correctly calculated parole guideline range. It appears that their revised bad faith cause of action may have been plaintiffs' attempt to revive, in part, their previously dismissed state-law claims - in effect, plaintiffs alleged that their previously dismissed claims should not have been dismissed because the district court relied on a false affidavit in declaring those claims moot.

Nevertheless, plaintiffs' bad-faith claims do not affect the resolution of this case. First, plaintiffs should have moved for reconsideration, rather than alleging an additional claim, if they wanted the district court to revisit its earlier ruling. Second, plaintiffs have not attempted to explain how the filing of the allegedly false affidavit violated the Constitution or federal law. Third, and most importantly, plaintiffs' allegations do not even suggest that Spence's affidavit was actually false. The affidavit states that, after *Layne*, the OAPA took into account only a prisoner's actual convictions in calculating the prisoner's parole guideline range. The *Layne* court, however, concluded that the OAPA could consider any other factors in making its ultimate decision. *Id.* at 555. Spence's affidavit did not mention whether the OAPA considered other factors. Plaintiffs did not allege that the OAPA erroneously calculated any prisoner's guideline range, but instead alleged that a number of individual prisoners were not released on parole, despite serving more time in prison than their parole guideline range dictated. That practice is not inconsistent with *Layne* or Spence's affidavit; pursuant to *Layne*, the OAPA could have considered other factors and concluded that the prisoner's guideline range did not adequately serve the interests of society. Therefore, even if we were to assume that plaintiffs' bad-faith claims were raised properly, we would conclude that plaintiffs have failed to state a claim upon which relief can be granted.

IV.

Next, plaintiffs challenge the district court's holding that their due process claims fail because they do not havc a liberty interest in parole under state law. Plaintiffs contend that the district court erred in concluding that their claims are barred by *Jago v. Van Curen*, 454 US. 14, 20 (1981), and that their due process claims should be analyzed under the standard announced by the Court in *Sandin v. Conner*, 515 U.S. 472, 484 (1995). We affirm the district court's entry of summary judgment in favor of defendants on plaintiffs' due process claims.

In *Swihart v. Wilkinson*, 209 F. App'x 456 (6th Cir. 2006), we considered and rejected the same argument that plaintiffs raise here - that the denial of parole should be analyzed under *Sandin's* "atypical and significant hardship" standard. We held, in pertinent part, as follows:

> The district court properly concluded that Swihart's complaint failed to state a claim upon which relief could be granted. Although Swihart's due process challenge to the procedures used by the parole board is cognizable under §1983 pursuant to *Wilkinson v. Dotson*, 544 U.S. 74 (2005), Swihart failed to state a violation of due process.

A plaintiff bringing a §1983 action for procedural due process must show that the state deprived him or her of a constitutionally protected interest in "life, liberty, or property" without due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (*citing Parratt v. Taylor*, 451 U.S. 527, 537 (1981)). A Fourteenth Amendment procedural due process claim depends upon the existence of a constitutionally cognizable liberty or property interest with which the state has interfered. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). However, this Court has repeatedly noted that "there is no constitutional or inherent right of a convicted person to be conditionally released [e.g., paroled] before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). The Constitution of the United States does not require a state to provide a parole system. *See Pennsylvania v. Finley*, 481 U.S. 551, (1987). More importantly, the state of Ohio has not created a liberty interest in parole eligibility, as it has a completely discretionary parole system. *See Saunders v. Williams*, 89F. App'x 923,924 (6th Cir. 2003); OHIO REV. CODE § 2967.03; *Jago v. Van Curen*, 454 U.S. 14, 20-21 (1981); *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-37 (6th Cir. 1991).

Swihart argues that the Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), requires his claim be analyzed under a different standard and that the "nature of the deprivation" must be considered. However, Swihart's due process claim also fails if analyzed under *Sandin*. In *Sandin*, the Supreme Court mandated that a state creates a liberty interest in avoiding certain prison conditions only where those conditions are an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* However, *Sandin* was

> decided only in the context of prison conditions, not parole eligibility. This Court has never held that an inmate's eligibility for parole at a certain time, under a discretionary parole system, is an "atypical and significant hardship." Swihart's eligibility or noneligibility for parole does not affect the manner in which he is confined and, thus, no liberty interest is implicated.

Swihart, 209 F. App'x at 458-59. Although *Swihart* is an unpublished decision and, therefore, not precedentially binding under the doctrine of stare decisis, *Williamson v. Aetna Life Ins. Co.*, 481 F. 3d 369, 376 n .4 (6th Cir. 20037), we find this portion of its analysis persuasive and consistent with our due process Jurisprudence.[3] Since *Swihart*, we have not extended *Sandin* to the parole eligibility context, and plaintiffs have not articulated why *Sandin's* "atypical and significant hardship" standard should be so expanded. We therefore affirm the district court's entry of summary judgment on plaintiffs' due process claims in favor of defendants.

---

[3] As discussed in Section V, *infra*, we reject, as inconsistent with Supreme Court precedent, the additional holding of *Swihart* that "the Ohio parole guidelines which postpone parole are guidelines only, not laws, and are, therefore, not subject to the Ex Post Facto Clause." *Swihart*, 209 F. App'x at 459.

V.

Plaintiffs next challenge the district court's entry of summary judgment in favor of defendants on their equal protection claims. Plaintiffs contend that the State violates the Equal Protection Clause by giving new inmates fixed sentences, while inmates sentenced prior to 1995 serve indeterminate terms. In addition, plaintiffs argue that the State violated the Equal Protection Clause by adopting the 1998 guidelines. The district court granted defendants' motion for summary judgment, holding that the State's decision not to apply the 1996 sentencing law retroactively and to adopt the 1998 guidelines withstands a rational basis constitutional review. We agree with the district court and affirm.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

As we have explained, "to withstand Fourteenth Amendment scrutiny, statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest." *Jackson v. Jamrog*, 411 F.3d 615, 618 (6th Cir. 2005) (quoting *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002)). The district court concluded properly that plaintiffs are not members of a suspect class and that they do not allege a violation of a fundamental right. "Without question, prisoners are not considered a suspect class for purposes of equal protection litigation." *Jackson*, 411 F .3d at 619; see also *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998). In addition, there is no fundamental right to parole under the Constitution. *Bd. of Pardons v. Allen*, 482 US. 369,373 (1982); *Jackson*, 411 F.3d at 619.

Because neither a fundamental right nor a suspect class is at issue, the rational basis review standard applies. *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby* , 470 F.3d 286, 298 (6th Cir. 2006). "Under rational basis scrutiny, government action amounts to a constitutional violation only if it 'is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational. ", *Id. (quoting Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005)). The plaintiffs bear the burden of demonstrating that the government lacks a rational basis, and they may satisfy this burden either by negating "' every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will.'" *Id.* (quoting *Warren*, 411 F.3d at 711). The State, conversely, bears no burden of proof; its legislative choice is presumptively valid and '"may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* (quoting *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005)).

We hold that plaintiffs have not negated defendants' asserted rational bases for refusing to apply the 1996 sentencing law retroactively and for adopting the 1998 guidelines. Among its stated rationales for limiting the 1996 sentencing law to prospective application only, the State argues that the Ohio legislature sought to address the issue of sentencing reform "one step at a time." In general, this is a rational basis. *See Williamson v. Lee Optical* *of Oklahoma, Inc.*, 348 US. 483,489 (1955) ("The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.") (internal citations omitted). Defendants have also explained the prospective application of the new sentencing law by stating that it keeps "with the well recognized rule of statutory construction that provides 'statutes affecting substantive rights and liabilities are presumed to have only prospective effect.'" *Crosby-Bey v. District of Columbia*, 700 F. Supp. 71,73 (D.D.C. 1988) (quoting *Anderson v. U.S. Air, Inc.*, 818 F.2d 49, 53 (D.C. Cir. 1987) and *Bennett v. New Jersey*, 470 US. 632, 639 (1985)). These rationales are sufficient to satisfy our rational basis review in light of binding precedent, *see Meeks v. Jago*, 548 F.2d 134, 138 (6th Cir. 1976), abrogated on other grounds by *Rose v. Lundy*, 455 US. 509,522 (1982), and plaintiffs have not offered any argument or evidence in response.

In explaining their adoption of the 1998 guidelines, defendants stated in the district court that the previous guidelines "did not allow for sufficiently accurate evaluation of inmates' cases, and [they] produced inconsistent results and very low release rates." Further, defendants argued that the intent behind the new guidelines was to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing the opportunity for consideration of parole eligibility on an individual case basis." As the district court found, the 1998 guidelines "implement that rational objective by providing a means to channel the factors parole officials focus on when making release decisions." On appeal, plaintiffs have not offered any argument or evidence to rebut that rationale. Thus, we affirm the district court's entry of summary judgment on plaintiffs' equal protection claims.

VI.

Finally, plaintiffs argue that the district court erred in holding that the Ex Post Facto Clause does not apply to Ohio's parole guidelines. The district court granted defendants' motion for summary judgment on plaintiffs' Ex Post Facto Clause claims, holding that "[i]ntemal parole guidelines 'are not laws for ex post facto purposes because the guidelines do not absolutely restrict parole officials' discretion.'" In the alternative, the court held that, even assuming the guidelines are laws for ex post facto purposes, retroactive application of the guidelines does not create a sufficient risk of increasing the measure of punishment attached to the underlying crime. We agree with the district court's alternate holding and affirm on that basis.

The Constitution prohibits states from imposing ex post facto laws. U.S. CONST. art. I, §10, cl. 1. "An ex post facto law possesses two elements: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender affected by it.'" *Dyer v. Bowlen*, 465 F.3d 280, 285 (6th Cir. 2006) (quoting *Lynce v. Mathis*, 519 US. 433, 441 (1997)). In granting defendants summary judgment on plaintiffs' ex post facto claims, the district court relied on *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977), to hold that the 1998 guidelines are not "laws" for ex post facto purposes. In *Ruip*, the appellant was sentenced in 1971 to a term of eighteen years imprisonment for his participation in an armed bank robbery. *Id.* at 1332.

In 1973, the United States Parole Commission established a national parole policy and adopted parole guidelines. *Id.* at 1333. After the appellant was denied parole in 1975, he raised an ex post facto challenge to the denial of his parole request, which was based on the application of the newly-promulgated guidelines. *Id.* at 1333-34. We denied the appellant's claim, holding that administrative guidelines on parole do not come within the prohibition against ex post facto laws. *Id.* at 1335-36. We reasoned that:

> what is involved in this case is not agency interpretation of law but an agency's setting up guidelines for itself to assure the uniform execution of its business. These guidelines are not law, but guideposts which assist the Parole Commission (and which assisted the Board of Parole) in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

Id. at 1335.

Although not previously addressed by this court in a published opinion, we now conclude that *Ruip* should no longer be followed because it is inconsistent with the Supreme Court's decision in *Garner v. Jones*, 529 U.S. 244 (2000).[4] In *Garner,* the Court considered an ex post facto challenge to the retroactive application of a Georgia regulation permitting the extension of intervals between parole violations. *Id.* at 247. Under Georgia law, the state's parole board was required to consider inmates serving life sentences for parole after seven years. *Id.* (citing GA. CODE ANN. § 429-45(b) (1982)). At the time the Garner respondent committed his second offense, the parole board's regulations required parole reconsiderations to take place every three years. *Id.* In 1985, after the respondent had begun serving his second life sentence, the parole board amended its rules and regulations to provide that "reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years." Id. (quoting GA. COMP. R. & REGS., Rule 475-3-.05(2) (1985)). The Parole Board considered the respondent for parole in 1989, seven years after his 1982 conviction. *Id.* After denying release, reconsideration was set for 1997, eight years later and consistent with Rule 475-3-.05(2). *Id.*

---

[4] *See generally United States v. Checchini*, 967 F.2d 348, 350 (9th Cir. 1992) (applying the rule that circuit court opinions should not be followed when they are inconsistent with an interviewing Supreme Court decision.)

The Court concluded that, on its face, the new parole board of regulation did not pose a significant risk of lengthening the respondent's time of imprisonment.[5] *Id.* at 256. The Court noted two important aspects of the new regulation. First, the amendment "vests the Parole Board with discretion as to how often to set an inmate's date for reconsideration, with eight years for the maximum." *Id.* at 254 (quoting GA. COMP. R. & REGS., Rule

---

[5] Because the "Court of Appeals' analysis failed to reveal whether the amendment to Rule 475-3-.05(2), in its operation, created a significant risk of increased punishment for respondent," and because the respondent claimed that he had not been permitted sufficient discovery to make this showing, the Supreme Court remanded the case for further discovery. *Id.* at 257.

475-3-.05(2) (1985)) ("Reconsideration ... shall take place at least every eight years. "). Second, the parole board's policies permit "expedited parole reviews in the event of a change in their circumstances or where the Board receives new information that would warrant a sooner review." *Id.* These characteristics were significant because they "permit a more careful and accurate exercise of the discretion the Board has had from the outset." *Id.* "The policy enables the Board to put its resources to better use, to ensure that those prisoners who should receive parole come to its attention." *Id.*

There are several aspects of the Supreme Court's decision in Garner that contradict our ex post facto jurisprudence and affect Ohio's parole guidelines at issue here. First, the Court made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny: "The presence of discretion does not displace the protections of the Ex Post Facto Clause, however." *Id.* at 253; *Dyer*, 465 F.3d at 288 (noting that *Garner* provides "that discretion in parole considerations does not insulate the state from ex post facto violations. "). *Cf Kilbane v. Kinkela*, 24 F. App'x 241,242-43 (6th Cir. 2001) ("In the past, this court has found that Ohio parole officials have complete discretion in deciding whether an Ohio inmate will be paroled ... and the plaintiffs point to no change in the law negatively restricting this discretion.") (citing *Inmates of Orient Corr. Inst. v. Ohio St. Adult Parole Auth.*, 929 F.2d 233,236 (6th Cir. 1991)); *Adams v. Upper*, No. 94-4235, 67 F.3d 299, 1995 WL 570915, at *2 (6th Cir. Sept. 27, 1995) (unpublished table decision) ("Parole guidelines that do not divest a parole board's discretion in granting parole do not qualify as ex post facto laws.").

Second, as Justice Scalia noted in his concurring opinion in *Garner*, the parole guidelines at issue in *Garner* were administrative regulations issued by the Georgia State Board of Pardons and Paroles, rather than a change to the parole laws made by the Georgia legislature. *See Garner*, 529 US. at 249 (Scalia, J., concurring) ("I would agree with the Court's opinion if we were faced with an amendment to the frequency of parole-eligibility determinations prescribed by the Georgia legislature."). The application of ex post facto scrutiny to an administrative regulation in Garner contradicts our holdings in several unpublished decisions decided after *Garner*.[6]

Finally, the respondent in *Garner* was serving his second life sentence, after previously escaping from prison and committing murder while on escape. *Garner*, 529 US. at 247. Although it was impossible for the respondent to serve a longer term of imprisonment than his maximum imposed sentence

---

[6] *See, e.g., Swihart*, 209 F. App'x at 459 (observing that this court has held previously that "the Ohio parole guidelines which postpone parole are guidelines only, not laws, and are, therefore, not subject to the Ex Post Facto Clause"); *Conley*, 23 F. App'x at 506 (same); *see also Kilbane*, 24 F. App'x at 242-43 (denying ex postfacto challenge to 1998 guidelines and observing that "this court has found that Ohio parole officials have complete discretion in deciding whether an Ohio inmate will be paroled and the plaintiffs point to no change in the law negatively restricting this discretion") (internal citation omitted). These unpublished opinions are not precedentially binding under the doctrine of stare decisis, *United States v. Sanford*, 476 F.3d 391,396 (6th Cir. 2007), and no published Sixth Circuit case since *Garne*r has held that the Ohio parole guidelines are not "laws" within the meaning of the Ex Post Facto Clause.

(life), the Supreme Court nevertheless remanded the case to the district court so that the respondent could engage in discovery in order to attempt to establish that the challenged parole created a significant risk of increased punishment for the respondent. *Id.* at 248-49. Cf *Hunt v. Wilkinson*, 79 F. App'x 861, 862 (6th Cir. 2003) (unpublished) ("Hunt was sentenced, as noted above, to life in prison, consecutive to other terms of imprisonment, with the possibility of a discretionary grant of parole. The new regulations, which may increase the periods between parole hearings, and do not give Hunt a projected release date, do nothing to increase the punishment to which Hunt was originally sentenced. ").

After *Garner*, the relevant inquiry, therefore, is not whether the challenged parole regulation is a "law" or whether the guidelines present a significant risk of increasing the plaintiffs maximum penalty, but rather whether the new guidelines present a significant risk of increasing the plaintiffs amount of time actually served. *See Garner*, 529 U.S. at 255 ("When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the current rule."); *id.* ("In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment. "). *See also Fletcher v. Reilly,* 433 F .3d 867, 869-70 (D.C. Cir. 2006) (observing that it is clear after Garner that "the critical question in ex post facto challenges to retroactively applied parole/reparole regulations is whether, as a practical matter, the retroactive application creates a significant risk of prolonging an inmate's incarceration"). But see *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006) (holding that post-Booker Sentencing Guidelines are not subject to ex post facto analysis, as "the ex post facto clause should apply only to laws and regulations that bind rather than advise, a principle well established with reference to parole guide-lines whose retroactive application is challenged under the ex post facto clause").

We find the D.C. Circuit's experience in the wake of *Garner* particularly instructive. In *Fletcher v. District of Columbia*, 370 F.3d 1223, 1228 (D.C. Cir. 2004) ("*Fletcher I*"), the court rejected a habeas petitioner's ex post facto challenge to the application of the United States Parole Commission guidelines to his parole hearing, holding that a parole guideline is not a "law" within the proscription of the Ex Post Facto Clause. Upon the inmate's petition for rehearing, the Court of Appeals for the D.C. Circuit vacated *Fletcher I*, acknowledging *Garner's* instruction that the "controlling inquiry" is "'whether retroactive application of the change' in a regulation respecting parole creates 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Fletcher v. District of Columbia*, 391 F.3d 250,251 (D.C. Cir. 2004) ("*Fletcher II*") (quoting *Garner*, 529 US. at 250). The D.C. Circuit in Fletcher II observed that, in *Garner*, the Court "foreclosed our categorical distinction between a measure with the force of law and 'guidelines [that] are merely policy statements from which the Commission may depart in its discretion.' Rather, the question is one of practical effect." *Fletcher II*, 391 F.3d at 251 (internal citation omitted).

In a later appeal, the D. C. Circuit Court reiterated its continued allegiance to *Garner's* focus on the practical effect to the plaintiff: "The labels 'regulation' and 'guideline' are not determinative.

And the existence of discretion is not dispositive. The controlling inquiry under *Garner* is how the Board or the Commission exercises discretion in practice, and whether differences between the exercise of discretion in two systems actually' create[] a significant risk of prolonging [an inmate's] incarceration.'" *Fletcher v. Reilly*, 433 F.3d 867,876-77 (D.C. Cir. 2006) ("*Fletcher II*") (quoting *Garner*, 529 US. at 251). The 1998 Ohio guidelines are similar to the guidelines at issue in *Fletcher* as they both guide the discretion of the parole board in making parole determinations, and we find the approach taken by the D.C. Circuit to be consistent with *Garner*.

The relevant inquiry in this case, then, is whether retroactive application of the 1998 Ohio guidelines creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Garner*, 529 US. at 250; Dyer, 465 F.3d at 285. Plaintiffs can satisfy this burden in one of two ways. First, plaintiffs can establish an ex post facto violation if they can show that the guidelines, on their face, show a significant risk of increased incarceration. *Garner,* 529 US. at 255. Second, when the guidelines do not by their own terms show a significant risk, plaintiffs "must demonstrate, by evidence drawn from the [guideline's] practical implementation by the agency charged with exercising discretion, that its application will result in a longer period of incarceration than under the earlier [guidelines]." *Id.*; *see also Dyer*, 465 F.3d at 291 (observing that "even when considering substantive changes to parole provisions, the Supreme Court has relied on evidence of actual disadvantage" to the plaintiff). Plaintiffs need not show an actual increase in punishment, but rather a "sufficient risk" of increased punishment. *Dyer*, 465 F.3d at 288.

We hold that on this record, plaintiffs have not shown that a genuine issue of material fact exists regarding whether the retroactive application of the 1998 guidelines, either on their terms or as applied to plaintiffs, creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Garner*, 529 US. at 250. First, although plaintiffs cite *Garner* in their brief, they make no argument in the section of their brief devoted to their ex post facto claim that the guidelines create a sufficient risk of increasing the length of imprisonment for plaintiffs.

Moreover, the disparity among members in the plaintiff class precludes a uniform analysis of their ex post facto claims. Prior to 1987, no guidelines were issued to guide the parole board's discretion in making sentencing determinations. In 1987, the parole board adopted guidelines to assist it in exercising its discretion. *See State v. Capots*, 546 N.E.2d 412 (Ohio 1989). Eleven years later, in 1998, the OAPA adopted the guidelines at issue here, replacing the 1987 guidelines. The purported class of plaintiffs, however, includes members who were convicted before the 1987 guidelines were adopted, as well as members who were convicted after the 1987 guidelines were enacted. For plaintiffs who were convicted before the 1987 guidelines were in effect, the relevant ex post facto inquiry is whether the present guidelines create a sufficient risk of increased punishment compared to the pre-1987 standards; for plaintiffs convicted after 1987, the comparison is between the 1987 guidelines and the 1998 guidelines. Although the parties have included the 1998 guidelines in the joint appendix, the 1987 guidelines are not included.

Similarly, because plaintiffs' motion for class certification has not been granted, they must demonstrate that a genuine issue of material fact exists as to whether each individual plaintiff faces a significant risk of increased incarceration due to the application of the 1998 guidelines. Yet, on appeal, plaintiffs have not attempted to show how anyone individual defendant faces a substantial risk of serving more time under the new guidelines.

Finally, plaintiffs point to three pages of charts and graphs in the record, which compare the amount of time served under the 1998 guidelines to the minimum sentence assigned by the trial court.[7] These statistics fail to support plaintiffs' claim in two ways. First, the sample group of inmates apparently does not distinguish between inmates sentenced before and after the 1987 guidelines. Second, the statistics purport to show only that inmates sentenced under the 1998 guidelines are likely to wait until after their minimum sentences have expired before receiving their initial parole hearing, are likely to receive sentences and projected sentences that exceed the minimum sentence, and are likely to receive sentences and projected sentences that exceed even the sentences recommended by the guidelines. Plaintiffs assert that they would have received their initial parole hearings earlier and would have ultimately received shorter sentences under pre-1998 practices, but have not pointed to any evidence in the record whatsoever regarding pre-1998 practices. Without any evidence of how current parole practices differ from pre-1998 practices, plaintiffs cannot establish a violation of the Ex Post Facto Clause.

---

[7] The study was apparently performed by plaintiffs' attorney Sirak, who pulled 600 cases and encoded each inmate's offenses under one of seven categories: (1) sex crimes, (2) homicide, (3) drugs, (4) property crimes, (5) assault, (6) kidnapping, and (7) child endangerment. Dr. Martin Schwartz was retained by plaintiffs and opined that the 600 sample size of Sirak's study is statistically similar to the rest of the sample of cases, and that "any statistics run on this set of 600 cases can be taken as representative of the full group of cases."

Moreover, even if plaintiffs' statistical study purported to show that inmates served longer sentences under the 1998 guidelines than they would have before 1998, such results would be unsurprising in light of *Layne*. In *Layne*, the plaintiffs were Ohio inmates whose convictions were based on plea agreements in which the inmate pleaded guilty to lesser-included charges in exchange for the state's dismissal of the most serious charge on the indictment. When the plaintiffs first became eligible for parole after the adoption of the 1998 guidelines, the inmates were assigned criminal history points based on the crimes for which they were originally indicted, rather than the crimes for which they were ultimately convicted. *Id.* at 551. This resulted in the plaintiffs receiving an applicable guidelines range that provided for parole eligibility later than the inmate's minimum sentence. *Id.* at 555. The Ohio Supreme Court held that this practice breached the inmate's plea agreements and rendered meaningless former OHIO REV. CODE §2967.13, which provided that an inmate "becomes eligible for parole at the expiration of his minimum term." *Id.* The court held further that "in any parole determination involving indeterminate sentencing, the APA must assign an inmate the offense category score that corresponds to the offense or offenses of conviction." *Id.* Plaintiffs here do not specify whether the sample size of their study post-dates *Layne* and, thus, whether the guidelines as now practiced have the effect of delaying initial parole hearings. Furthermore, plaintiffs' study does not purport to show whether inmates actually serve more time under the 1998 guidelines than under the former system.

Given these deficiencies in plaintiffs' proofs, we conclude that plaintiffs have not raised a genuine issue of material fact regarding whether the retroactive application of the 1998 guidelines creates a substantial risk of increased punishment for any member of the class. We therefore affirm the district court's alternate holding and its entry of summary judgment to defendants on plaintiffs' ex post facto claims.

VII.

One last issue merits our attention. Plaintiffs assert that "[a]n entire class action lawsuit seeking habeas corpus relief has fallen through the cracks, drawing no comment at all." From this and other comments made at oral argument, it appears that plaintiffs believe that, in addition to their §1983 action, they have filed a petition for a writ of habeas corpus based on issues related *to Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). The source of this belief appears to be plaintiffs' "Supplemental Pleading Pursuant to Rule 15(d)," filed in the district court on May 24, 2005. In appropriate circumstances, a party may, with permission of the court, "serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." FED. R. CIV. P. 15(d). Plaintiffs attempted to take advantage of Rule 15 by filing a supplemental pleading that referenced *Blakely* and *Booker*. Plaintiffs appear to believe that they stated additional claims in their supplemental pleading - claims unaddressed by the district court.

Plaintiffs' belief is mistaken. First, plaintiffs did not set forth any new "transactions or occurrences or events" in their supplemental pleading, but instead attempted to allege additional claims for relief based on the same events underlying their original pleading. A Rule 15(a) motion for leave to amend the complaint, not a Rule 15(d) motion to supplement the pleading, is the appropriate mechanism through which a party may assert additional claims for relief. See United States v. Hicks, 283 F.3d 380, 385-86 (D.C. Cir. 2002) ("The question in this case is whether intervening judicial decisions are the sort of 'occurrences or events' to which Rule 15(d) refers. We think not. The purposes to which the rule is typically put support the conclusion that the appropriate bases for supplemental pleadings are new facts bearing on the relationship between the parties, rather than merely changes in law governing those facts."). Second, a review of the "Supplemental Pleading Pursuant to Rule 15(d)" indicates that it did not state any new claims, but instead merely discusses habeas corpus relief and describes the circumstances of a number of named plaintiffs. Because plaintiffs abused Rule 15(d) and did not state any new claims in their supplemental pleading, plaintiffs never properly filed their purported "class action seeking habeas corpus relief." Accordingly, we conclude that the district court did not err in declining to address plaintiffs' purported habeas claims.

VIII.

For the reasons set forth above, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dennis Michael, et al.,
Plaintiff, Case No. 3:01CV7436

v. **ORDER**

Margarette Ghee, et al.,
Defendants.

These are claims under 42 U.S.C. § 1983 brought by inmates confined in Ohio penal institutions. Plaintiffs allege the state's parole system violates the U.S. and Ohio Constitutions, as well as state law.

Jurisdiction exists under 42 U.S.C. § 1331.

Pending are the State's motions to dismiss, for summary judgment, and to exclude certain of plaintiffs' exhibits.

For the following reasons, the State's motions to dismiss and for summary judgment are granted, and the motions to exclude shall be overruled as moot.[1]

---

[1] No ruling is required on the motions to exclude because a decision either way would not affect the

Background

Plaintiffs are "old law" inmates who were prosecuted under Ohio's former sentencing law, which expired in 1996. Doc. 140 at 6. The former sentencing law used indeterminate sentences: an inmate was given a minimum and a maximum sentence, such as five to twenty-five years. Id. at 10. These inmates were then subject to the Ohio Adult Parole Authority (AP A), which determined when - between the minimum and maximum sentence - release was appropriate. Doc. 140 at 10-11. Inmates became eligible for parole on serving their minimum sentences, less credit for good behavior. *Id.* at 12-13.

In 1995, the Ohio legislature passed a new sentencing law. Under that law, the judge determines the exact sentence and parole is no longer available. Doc. 140 at 16. The law did not, however, retroactively eliminate parole for old law inmates or alter such inmates' parole eligibility dates.

In 1998, the AP A adopted guidelines to channel the discretion of parole officials making release decisions for old law inmates. Doc. 39 at 10. The 1998 guidelines are similar to those used by the

---

outcome of this decision.

U.S. Parole Commission. *Id.* at 11. The new guidelines use two factors, outlined on a grid, to determine how long a prisoner should be incarcerated before parole. *Id.* The first factor is the offense behavior - the seriousness of the crime. *Id.* at 12. The second factor is the "risk of reoffense," which is based primarily on an inmate's prior criminal conduct and performance on probation and parole. *Id.* at 13.

"The presumptive amount of time an inmate should serve before parole is determined by finding the intersection between his offense category and the risk level on the grid." Doc. 39 at 13. Parole officials can, however, depart from the guidelines based on numerous factors, such as misconduct in prison and outstanding achievement in rehabilitative programming. *Id.* The guidelines do not enable the prison system to hold an inmate beyond the maximum sentence set by court. *Id.*[2] The new guidelines did not alter the inmates' parole eligibility dates. The APA applied, and continues to apply, the

---

[2] Before 1998, the APA used guidelines adopted in 1987. Doc. 140 at 14. The 1987 guidelines used a weighted point system that considered, *inter alia*, the type of offense. *Id.* Plaintiffs do not challenge the 1987 guidelines.

1998 guidelines to inmates sentenced before the guidelines' adoption.

Plaintiffs challenge many APA practices, procedures, and proceedings. Plaintiffs claim the guidelines, practices, procedures, and proceedings deny them, or will in the future deny them, consideration for parole in a manner that violates: 1) due process; 2) equal protection; 3) the Ex Post Facto Clause of the Federal Constitution; and 4) various provisions of state law. Plaintiffs also assert that the APA improperly promulgated the 1998 sentencing guidelines and those guidelines as written and as applied violate state law.

The State claims its actions are legal and proper, stating: 1) the majority of plaintiffs' claims raise issues that only involve state law, and therefore cannot be challenged via § 1983; 2) retroactive application of the 1998 guidelines does not violate the Ex Post Facto Clause because the guidelines are not "laws;" 3) inmates do not have a liberty interest in parole implicating the Due Process Clause; and 4) parole procedures do not violate the Equal Protection Clause because the suggested reasons for treating inmates differently, based on the sentencing law applicable at the time, are rationally related to a legitimate government objective.

Discussion

A. Federal Constitutional Claims

I will address plaintiffs' fifth, sixth, and seventh causes of action first because they allege federal constitutional violations by their own terms and are therefore cognizable under § 1983. The sixth cause of action argues that the State's parole procedures violate due process. The seventh alleges that the State violates equal protection by treating old law inmates different from new law inmates. The fifth contends that retroactive application of the 1998 guidelines violates the Ex Post Facto Clause. None of these claims states a valid cause of action.

1. Sixth Cause of Action - Procedural Due Process

Procedural due process requirements only apply to deprivation of interests in liberty and property. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). The U.S. Constitution does not require states to provide due process absent such interests. *Olim v. Wakinekona*, 461 U.S. 238,250 (1983) (stating that the purpose of process is to protect recognized liberty and property interests); *Bd. of Regents*, 408 U.S. at 569. The threshold question, thus, is whether plaintiffs have a protected liberty or property interest. *Kentucky Dep 't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

The U.S. Constitution does not create a liberty interest in parole. *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Because Ohio law makes parole discretionary, inmates do not have a liberty interest in parole under state law. *Jargo v. Van Curen*, 454 U.S. 14, 20 (1981); *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir. 1991); *Wagner v. Gilligan*, 609 F.2d 866, 867 (6th Cir. 1979); *State ex rel. Hattie v. Goldhardt*, 69 Ohio St. 3d 123, 125-26 (1994).[3]

If inmates do not have a liberty interest in parole itself, they cannot have a liberty interest in parole consideration or other aspects of parole procedures. *Brandon v. Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987); *see also Olim*, 461 U.S. at 250 (state hearing requirements do not create a liberty interest absent an underlying liberty interest in the subject matter of the hearing); *Banner v. Bradley*, 28 F.3d 1213, *3 (6th Cir. 1984)(tab1e)(because Tennessee did not create a liberty interest in parole, inmates had no liberty interest in receiving a proper parole hearing as required by a state statute).

---

[3] Defendant correctly notes that, based on the cases cited, the U.S. Supreme Court, Sixth Circuit, and Ohio Supreme Court have all held that Ohio inmates have no liberty interest in parole. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456 (2002), did not overrule these precedents.

Because plaintiffs have no liberty interest in parole, their procedural due process claim fails.[4]

2. Seventh Cause of Action - Equal Protection

Plaintiffs argue the State violates the Equal Protection Clause because it distinguishes between old and new law inmates by, *inter alia*, giving new law inmates fixed sentences and old law inmates indeterminate sentences. Other alleged equal protection violations against old law inmates include: 1) promulgation of Ohio Admin. Code § 5120-2-03, which requires inmates to serve consecutively any sentences imposed for crimes committed on parole; 2) adoption of the 1998 parole guidelines; and 3) consideration by parole officials of prison misconduct in setting release dates.

---

[4] Plaintiffs do not appear to be raising a substantive due process challenge to parole procedures. To the extent that they do, such a challenge would fail because the parole procedures challenged do not implicate a fundamental right or a protected liberty interest, *see Greenholtz*, 442 U.S. at 6; *Johnson v. Rodriguez*, 110 F.3d 299,308 (5th Cir. 1997) (inmates cannot challenge state parole procedures under either substantive or procedural due process because they have no liberty interest in parole); *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145, 1150 (11th Cir. 1995) (rejecting substantive due process challenge on identical grounds).

Old law inmates do not have a fundamental right to release at the end of their minimum sentence. The U.S. Supreme Court has held there "is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz*, 442 U.S. at 6; *Jackson v. Jamrog*, 411 F.3d 615, 618-19 (6th Cir. 2005). In addition, inmates are not a suspect class for Equal Protection Clause purposes. *Jackson*, 411 F .3d at 618-19. If state actions do not affect a suspect class or implicate a fundamental right, rational basis review applies. *Id.* Because the plaintiffs are not members of a suspect class and, as discussed above, parole does not implicate a fundamental right, the rational basis standard applies. *Greenholtz*, 442 U.S. at 6; *Jackson*, 411 F.3d at 618-19.

Under rational basis review, courts will uphold governmental policy if there is a rational relationship between the state action and some legitimate government purpose. *Midkiff v. Adams County Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005). Rational basis review is deferential: "the governmental policy at issue will be afforded a strong presumption of validity [...]" *Id.* "[U]nder rational basis review, a purported rational basis may be based on rational speculation unsupported by evidence or empirical data and need not have a foundation in the record." *Id.* (quotations and citations omitted). This standard places a "severe burden" on plaintiffs such that they "must negate all possible rational justifications " of the state action. *Id.* (quotations and citations omitted).

Here, rational bases exist for each of the State's actions at issue.

a. Different Treatment of Inmates Based on Date of Conviction

First, defendants note there are several rational reasons that could have motivated the Ohio's legislature to require old law inmates to continue to serve their indeterminate sentences subject to Parole Board determinations. Among these are a desire to: 1) avoid passing retroactive legislation and altering the sentences of inmates already incarcerated; 2) give Ohio's old law inmates the incentive to obey prison regulations by keeping the parole system in place, which rewarded them for good behavior; and 3) acknowledge the seriousness of the convicted offenses. Doc. 292 at 98. Plaintiffs have not negated any of these reasons.

b. Promulgation of Ohio Admin. Code § 5120-2-03

Second, drafting Ohio Admin. Code § 5120-2-03 to require inmates to serve sentences for crimes committed on parole consecutively with original sentences was a rational continuation of existing practices. The same result was required by former O.R.C. § 2929.41(B).[5] Ohio's courts routinely required that sentences run consecutively. *Richards v. Eberlin*, 2004 WL 1152863, * 3 (Ct. App.). This is so, even if the sentencing order for the crime committed while on parole is silent on whether the sentences should run concurrently or consecutively. *Eberlin*, 2004 WL 1152863 at *3; *State v. Rhoades*, 2001 WL 950685, *2 (Mahoning Co.); *see also Harris v. Ohio Adult Parole Auth.*, 2005 WL 3642706 (Ct. Cl.) (stating that sentences had to be served consecutively because the inmate was incarcerated from crimes committed in 1989 while on parole from a sentence he was serving for a 1982 conviction).

---

[5] Former O.R.C. § 2929.41(B) states: "A sentence of imprisonment shall be served consecutively to any other sentences of imprisonment, in the following cases: [...] (3) When it is imposerd for a new felony committed by a probationer, parolee, or escapee." Former O.R.C. § 2929.41(B)(3) (effective prior to July 1, 1996).

c. Promulgation of the 1998 Guidelines

Third, the State had a rational basis for adopting the 1998 guidelines. The previous guidelines "did not allow for sufficiently accurate evaluation of inmates' cases, and [they] produced inconsistent results and very low release rates." Doc. 292 at 99. The state legislature intended the guidelines to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing the opportunity for consideration of parole eligibility on an individual case basis." *Id.* (quoting *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456 (2002)). The guidelines implement that rational objective by providing a means to channel the factors parole officials focus on when making release decisions. Thus, the guidelines have a rational relationship between their objective and the means employed.

d. Consideration of Prison Misconduct in Release Decisions

Finally, it is rational for parole officials to consider prison misconduct when making parole release determinations. One purpose of the parole system is prison management, which is facilitated by providing incentives for good behavior and disincentives for misconduct. Doc. 292 at 100. Thus, it is rational to consider inmates' violations of prison rules during parole hearings. *Id.*

Thus, all aspects of plaintiffs' Equal Protection Clause claims fail because the state actions in question pass rational basis review, justifying summary judgment for the defendant.

3. Fifth Cause of Action - Ex Post Facto Clause

In their fifth cause of action, plaintiffs allege that retroactive application of the 1998 new guidelines violates the Ex Post Facto Clause of the U.S. Constitution. U.S. Const. art. 1, § 10, cl. 1. Specifically, plaintiffs argue the APA violates the Clause because it applies rules and guideline ranges from the 1998 guidelines to inmates who were convicted before the 1998 guidelines' enactment. *See* Doc. 140 at 102-05.

a. Guidelines Are Not "Laws"

The Constitution bars enactment of ex post facto laws. U.S. Const. art. I, § 10, cl. 1. "[L]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Retroactive changes to laws governing parole of prisoners can violate the Ex Post Facto Clause. *See Lynce v. Mathis*, 519 U.S. 433,445-46 (1997). The State argues the APA's internally-created parole guidelines are not "laws" and therefore not within the ambit of the Ex Post Facto Clause.

Internal parole guidelines "are not 'laws' for ex post facto purposes because the guidelines do not absolutely restrict parole officials' discretion." *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977) (upholding retroactive application of federal parole guidelines on theory that guidelines are not laws); see *also Shabazz v. Gabry*, 123 F.3d 909,915 (6th Cir. 1997) (same, only with state parole guidelines); *Conley v. Ghee*, 23 Fed. Appx. 506, 507 (6th Cir. 2001); *Berry v. Traughber*, 48 Fed. Appx. 483, 485 (6th Cir. 2002) (holding that "the new policy is not a law subject to ex post facto analysis as it is more in the nature of a guideline for the [parole board] to use in exercising its discretion and as [the inmate] provided no evidence that the [parole board] lacked the discretion to modify the policy").

The guidelines do not bind the APA "[b]ecause neither statute nor regulation created the guidelines, and the board need not follow them, they place no substantive limits on official discretion." *State ex rel. Hattie v. Goldhart*, 69 Ohio St. 3d 123, 125 (1994).

The Sixth Circuit held the guidelines were not laws even though "the overwhelming majority of decisions fell within the guidelines" based on the fact that only five to twelve percent of decisions were outside the guidelines. *Ruip*, 555 F.2d at 1333. Thus, even evidence that parole authorities adhere to the guidelines ninety-five percent of the time does not make the guidelines "laws" for Ex Post Facto Clause purposes. *Id.*

Because Ohio's parole guidelines are not "laws" under the Ex Post Facto Clause, that provision does not bar retroactive application of them.

b. Retroactive Effect Permissible

Even if, however, the guidelines were laws for Ex Post Facto Clause purposes, the plaintiffs' claim would still fail because the Constitution does not impose a per se ban on laws that retroactively apply changes to parole procedures.

"[N]ot every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited." *Garner v. Jones*, 529 U.S. 244, 249-50 (2000). The test is "whether retroactive application of the change in [the] law created a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* (citations omitted).

In *Garner*, 529 U.S. at 250, the Court held that a law retroactively reducing the frequency of parole reconsideration hearings did not violate the Ex Post Facto Clause. *Id.* The Court noted: 1) the state's parole policies allowed for expedited reviews and reconsideration based on suitability for release of particular prisoners, *id.* at 253; and 2) the change did not alter the date of the prisoner's initial parole hearing. *Id.* at 250.

The Sixth Circuit has held that retroactive use of parole guidelines challenged here "do[es] not show a significant risk of increased punishment" and that "Ohio parole officials have complete discretion in deciding whether an Ohio inmate will be paroled." *Kilbane v. Kinkela*, 24 Fed. Appx. 241, 243 (6th Cir. 2001); *see also Akbar-El v. Wilkinson*, 1999 WL 282688, *2 (6th Cir.). Ohio courts have likewise held that retroactive application of the 1998 guidelines does not violate the Ex Post Facto Clauses of either the Ohio or U.S. Constitutions. *Thompson v. Ghee*, 139 Ohio App.3d 195,199 (Ct. App. 2000); *see also State v. Wright*, 2002 WL 31501275, *11-13 (Ct. App.); *State v. Masten*, 2002 WL 462857, *2 (Ct. App.).[6]

---

[6] Plaintiffs argue that parole authorities violate the Ex Post Facto Clause by refusing to exercise discretion in rigidly adhering to guidelines. In support of that proposition, plaintiffs cite an unreported district court case from the Northern District of Georgia, *Jackson v. State Bd. of Pardons & Parole*, 2002 WL 1609804 (N.D. Ga.). The discussion in *Jackson* is distinguishable because in that case authorities changed the parole procedures to delay significantly inmates' initial parole eligibility hearing. Here, the 1998 guidelines do not alter the initial parole eligibility date of Ohio inmates. Second, the Sixth Circuit has analyzed the Ex Post Facto Clause implications of the 1998 guidelines and upheld them. *See, e.g., Berry v. Traughber*, 48 Fed. Appx. 483,485 (6th Cir. 2002) (holding that Ohio's 1998 guidelines are not laws for Ex Post Facto Clause purposes); *Kilbane v. Kinkela*, 24 Fed. Appx. 241, 243 (6th Cir. 2001)(holding that retroactive application of guidelines does not significantly increase risk of prolonged incarceration). District courts in the Sixth Circuit cannot rule otherwise based on either *Jackson* or the plaintiffs' statistical evidence allegedly showing that the APA does not exercise its discretion

I see no reason to depart from those precedents. The 1998 guidelines do not change the date of inmates' initial parole hearings. To be sure, the guidelines recommend longer continuances before inmates receive reconsideration hearings but parole officials are not constrained by the Ex Post Facto Clause from postponing further consideration of parole suitability. In any event, the guidelines do not keep inmates in prison beyond their maximum sentence date.

Therefore, plaintiffs' fifth cause of action fails, and I will grant the state of Ohio's motion for summary judgment.

B. State Law Claims not Subject to § 1983

Section 1983 provides a remedy for deprivations of federal statutory and constitutional rights; it does not, however, cover violations of state law. *Huron Valley Hosp., Inc. v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989).

Because plaintiffs' first through fourth claims, along with all claims in the supplemental complaint, allege violations of state law, I will dismiss them under Rule 12(b)(6).

---

but merely follows the guidelines.

1. First Cause of Action - Abuse of Discretion

In their first cause of action, plaintiffs allege abuse of discretion by the AP A. This claim challenges parole practices between 1995 and 1997, as well as the APA's 1998 promulgation and implementation of new guidelines. In this cause of action plaintiffs contend, inter alia, that the new guidelines are invalid because the APA did not follow proper procedures when promulgating those guidelines.

The first cause of action does not invoke any specific provision of the U.S. Constitution. Instead, it describes how the new guidelines allegedly counter the purpose and goals of the prior guidelines.

Plaintiffs' first cause of action is thus essentially a state law challenge to the promulgation of the new guidelines. *See* Doc. 140 at 22 (stating that the "subject of federal review" was the act of "[p]romulgating guidelines which violate the U.S. Constitution and violate core principles of criminal law [...]"). The promulgation of new parole guidelines is a function of state law that does not involve federal statutory or constitutional issues.[7] No federal statutory or constitutional issues are implicated in the state law framework governing the Parole Board reviews that occurred between 1995 and 1997. Therefore, because plaintiffs cannot use § 1983 to enforce rights created solely by state law, the claim fails.[8]

---

[7] The first cause of action would still fail even assuming, *arguendo*, it argues that the APA

---

improperly promulgated the new guidelines. Ohio courts have repeatedly upheld the manner in which the APA adopted the new guidelines. *Poluka v. Ohio Adult Parole Auth.*, 2003 WL 124867, *4 (Ct. App.) (holding "it is well-established that the [Ohio] parole guidelines are not administrative rules and need not be promulgated in accordance with the Ohio Administrative Procedure Act"); *see also Ankrom v. Hageman*, 2005 WL 737833, *11 (Ct. App.); *State ex rel. Moore v. Ohio Adult Parole Auth.*, 2003 WL 1849212, *4 (Ct. App.); *Perotti v. Ishee*, 2001 WL 1357039, *3 (Ct. App. 2003); *Mayrides v. State Adult Parole Auth.*, 1998 WL 211923, *5 (Ct. App.).

[8] The plaintiffs also seem to challenge parole procedures used between 1995 and 1997 - before the 1998 guidelines were adopted - but they do not state the basis on which they believe that those procedures violated the U.S. Constitution. Elsewhere in their pleadings plaintiffs articulate specific grounds for their belief that parole reconsideration decisions from 1995 and 1997 were governed by improper motives and procedures. I address those arguments (which all fail) in detail as they arise.

Elsewhere in this opinion, I analyze whether the 1998 guidelines violate the Ex Post Facto, Due Process, and Equal Protection Clauses. To the extent that the first cause of action seeks to invoke those clauses, it is redundant. Other avenues to attack the constitutionality of the manner in which the APA promulgated the 1998 guidelines do not apply here. For example, arguing the promulgation of the guidelines violated the Presentment Clause of the U.S. Constitution, *see, e.g., U.S. v. Curtsinger*, 1995 WL 316673 (6th Cir.)(citing, *inter alia, U.S. v. Macias*, 930 F.2d 567,571-72 (7th Cir. 1991)), would be unavailing because the Presentment Clause only applies to the federal government. Promulgation of the guidelines did not violate the U.S. Constitution.[9]

---

[9] Although a violation of a state-created liberty interest may amount to a violation of the U.S. Constitution, not every violation of state law is a violation of the Constitution and thereby capable of supporting a § 1983 action. *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988); *Buckley v. Barlow*, 997 F.2d 494, (8th Cir. 1993); *Vruno v. Schwarzwalder*, 600 F.2d 124,130-31 (8th Cir. 1979) ("The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension."); *Richmond v. Cagle*, 920 F.Supp. 955, 958 (E.D. Wis.

2. Second Cause of Action - Arbitrary and Capricious Decision-Making

In their second cause of action, plaintiffs allege the APA engaged in arbitrary and capricious decision-making. This cause of action challenges, *inter alia*, parole release procedures between 1995 and 1997, the operation of a prior version of the Ohio Administrative Code, and the APA's consideration of inmate misconduct while incarcerated in making parole release decisions.

The challenges are all based solely on state law, do not implicate federal or constitutional issues, and thus are not actionable under § 1983. The first claim asserted on this cause of action relies on state parole guidelines. The second contends agency policy

---

1996) ("A violation of state law is not itself a violation of the Constitution.") Ohio courts have repeatedly ruled that the APA did not violate state law in promulgating the new guidelines, and it would be improper for me to rule to the contrary. *Archie*, 847 F.2d at 1217 (holding that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). Likewise, I cannot "transmute a violation of state law into a violation of the Constitution." *Id.*

wrongly abrogated valid portions of the Ohio Administrative Code. The third maintains the APA relied on biased and erroneous information in making decisions. None of these raise federal statutory or constitutional issues and thus fail to state cognizable claims under § 1983.

3. Third Cause of Action - Separation of Powers Doctrine

Plaintiffs' third cause of action alleges the APA violates the separation of powers doctrine by usurping the state judiciary's sentencing authority by: 1) continuing to imprison inmates beyond their state-law minimum sentences through guideline ranges with higher minimums; and 2) revoking parole based on technical violations.

The alleged violation of separation of powers doctrine relates to the relationship between the branches of Ohio' s government: plaintiff s contention being that the executive, through the APA, is taking over the job of the state judiciary. Any alleged violation concerns only state law. Thus, § 1983 is inapplicable.

4. Fourth Cause of Action - Bad Faith

Fourth, plaintiffs allege defendants acted in bad faith to deny parole to inmates who committed crimes before July 1, 1996, by circumventing the

Ohio Supreme Court's decision in *Layne v. Ohio Adult Parole Authority*, 97 Ohio S1. 3d 456 (2002). In general terms, this cause of action asserts that the APA is improperly disregarding an Ohio Supreme Court ruling. This is only a state law issue, to which § 1983 does not apply.

5. Supplemental Complaint - Wrongful Imprisonment Under State Law

All claims in the supplemental complaint also fail. The supplemental complaint seeks damages for wrongful imprisonment under a state statute, O.R.C. § 2743.48. Greater description of the claims in the supplemental complaint is not needed because plaintiffs cannot use § 1983 to seek redress for alleged violations of a state statute.

Conclusion

For the foregoing reasons, I find that the guidelines, practices, procedures, and proceedings that plaintiffs' complaint challenges do not violate due process of law or equal protection under the law, as guaranteed by the U.S. Constitution. Nor do they contravene the Ex Post Facto Clause. I conclude further that this court has no jurisdiction under the Civil Rights Act, 42 U.S.C. § 1983, to consider or adjudicate those claims that assert violations of the Constitution and laws of the State of Ohio.

It is, accordingly,

ORDERED THAT the State of Ohio's motion for dismissal and for summary judgment be, and the same here, is granted.

So ordered,

/s/ James G. Carr
James G. Carr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dennis Michael, et al.,
Plaintiff,

Case № 3:01CV7436

v.

ORDER

Margarette Ghee, et al.,
Defendants.

For the reasons stated in the opinion filed February 1, 206, it is hereby

Ordered that the State of Ohio' motion for dismissal and for summary judgment shall be, and the same hereby granted. Case closed.

So ordered.

/s/ James G. Carr
James G. Carr
Chief Judge

. . . . . although parole is within the powers of the executive branch, such cannot possibly mean that the APA's powers in this regard are unfettered. Indeed, the Ohio Supreme Court has explicitly recognized that the APA's wide-ranging authority and discretion over parole matters must yield when they run afoul of statutory enactmtimts and contractual law. See *Layne,* at ¶28. The same must hold true when the APA's authority and discretion run afoul of the constitutional doctrine of separation of powers.

{¶33} We also disagree with the APA's characterization that the trial court held it "usurped judicial authority." What the trial court in the present case found, in essence, was that the APA was assuming the underlying "function" of the judiciary by executing its own authority in the manner described. In making its arguments herein, the APA needlessly focuses on when the authority of the judiciary procedurally ends. When the authority of the judiciary ends procedurally is not relevant to the present issue. Neither is the procedural scope of its own "authority" relevant. Rather, what is relevant to the present analysis is the underlying "function" the APA assumed in executing its authority. Although the APA may be correct that the judiciary branch lost "authority" over the sentencing long before the APA took its actions in executing its parole determinations, the APA was still capable of impermissibly attempting to exercise the same "function" of the judiciary in executing its own authority, as the trial court found it did.

{¶34} Based upon our previous determinations under the APA's first assignment of error, we agree with the trial court that the APA's actions impermissibly encroached upon those functions exclusively within the domain of the judiciary branch. The judiciary branch has the power to set minimum and maximum sentences. See *Papp v. Ohio Adult Parole Auth.* (Jan. 24, 2002), Franklin App. No. 01AP-892. However, the APA's denial of

Page 30

meaningful consideration as of the earliest parole eligibility date, in effect, disregarded the trial court's sentence. Although the APA did not overtly assume the trial court's function to set the minimum sentence and, consequentially, the statutory date of parole eligibility, its denial of meaningful consideration had the effect of rendering the trial court's sentence meaningless and instituting its own minimum sentence and statutory date of parole eligibility. In doing so, the APA improperly took on the function of the judiciary branch of the government, in violation of the doctrine of separation of powers. For these reasons, the APA's third assignment of error is overruled.

{¶35} Appellees argue in their cross-assignment of error that the trial court erred in granting summary judgment to the APA on appellees' claim that the APA failed to promulgate the rules in accordance with the Administrative Procedure Act. The trial court found that parole guidelines are not administrative rules because the APA has discretion as to whether to apply them to inmates, and, as such, they need not be promulgated in accordance with the Administrative Procedure Act, relying upon this court's decision in *Poluka v. Ohio Adult Parole Auth.*, Franklin App. No. 02AP-484, 2003-Ohio-153. Appellees argue that, because the guidelines are effectively rules with a general and uniform operation, and not merely discretionary guidelines, they must be promulgated pursuant to the Administrative Procedure Act.

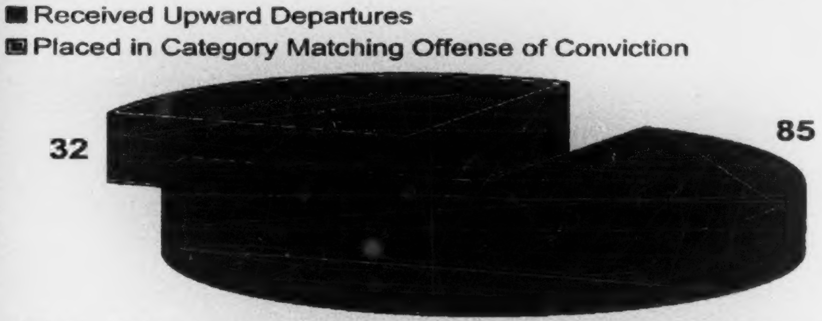
{¶36} The APA first counters that this issue cannot be determined in the context of a declaratory judgment action, citing two prior decisions of this court. In *Wise v. Ohio Dept. of Rehab. & Corr.* (1992), 84 Ohio App.3d 11, we found that. not being a rule, the parole guidelines do not fall under the purview of the declaratory judgment procedures outlined in R.C. 2721.03, which limits its application to constitutional provisions, statutes, ...

Parole Board Decision-Making after June 1, 2005

Upward Departures vs. Matching Category in *Ankrom Reviews*

On September 5, 2003, the parole board implemented all reforms prompted by the ***Layne Decision***.
On June 1, 2005, the Parole Board implemented all reforms prompted by ***Ankrom Decision.***
117 ***Ankrom*** Parole Board decisions dated between June 1, 2005 and August 11, 2005, after implementation of the post-*Layne* and post-*Ankrom* policy, were reviewed.
Upon review, 85 (72.6%) of 117 decisions resulted in upward departures from the category matching the offense of conviction.
(At the time of their hearing, all 117 of these inmates had served the minimum sentence required by the trial court.)

Upward Departures vs. Matching Category



■ **In all 32 cases, inmates were continued with no projected release date. These cases are poised to become upward departures in the future.**

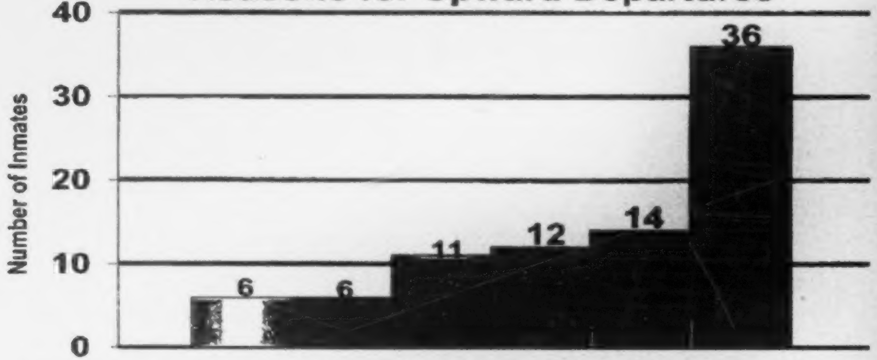
32 (27.4%) decisions were in compliance with the Parole Board's post ***Layne*** policy. 22 were serving time less than their minimum guideline. 10 were serving time equal to or within their guideline range.

The average time served to date for this group of inmates is 16.6 years, which is 6.5 years beyond the average time for their first statutory hearing.

■ **85 (72.6%) Inmates received upward departures from the Category Matching Offense of Conviction**

The average time served to date for this group of inmates is 16 years, which is 7.8 years beyond the average time for their first statutory hearing. These upward departures require an average of 4.6 additional years be served beyond the maximum guideline matching the offense of conviction.

Reasons for Upward Departures



85 (72.6%) received upward departures for the following reasons:

7.1% - 6 inmates received a departure for aggravated factors.

■ 7.1% - 6 inmates were continued to maximum guideline with no projected release date

■ 12.9% - 11 inmates received a departure for aggravated factors and bad time

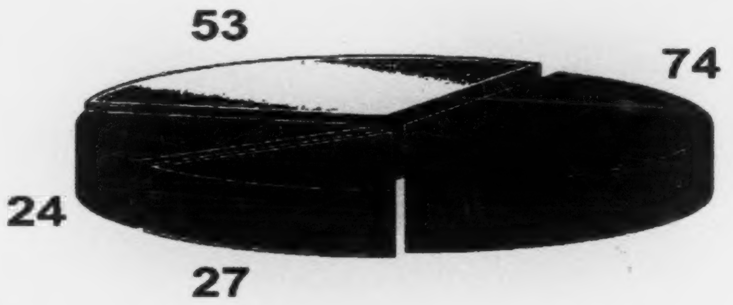
■ 14.1% - 12 inmates received a departure for bad time

■ 16.4% - 14 inmates received a discretionary risk score departure

■ 42.4% - 36 inmates received a departure for "any factors the APA deems relevant"

Summary of Parole Board Decision-Making after September 5, 2003
Stepping Off Time

On September 5, 2003, the parole board implemented all reforms prompted by the ***Layne Decision***. 178 Parole Board decisions dated between September 5, 2003 and March 31, 2005, after the implementation of the post-Layne reforms, were reviewed.



- ■ 41.6% - Serving time beyond maximum guideline and continued
- ■ 15.2% - Serving time within guideline range and continued beyond maximum guideline
- ■ 13.5% - Serving time beyond maximum guideline and paroled
- ☐ 29.7% - Received continuances less than or equal to maximum guideline

In summary

■ 74 (41.6%) serving time beyond their maximum guideline were continued. At their post-Layne review, all had served an average of 15.4 yrs. All received continuances, requiring an average of 18.5 yrs total time to be served, which is 7.8 yrs beyond their average maximum guideline. 66 of the 74 do not have a projected release date. 12 were continued to the maximum expiration of their sentence.

■ 27 (15.2%) serving time within guideline range were continued beyond their maximum guideline. At their post-Layne review, all had served an average of 14.7 yrs. All received continuances, requiring an average of 18.7 yrs total time to be served, which is 1.9 yrs beyond their average maximum guideline. 23 of the 27 do not have a projected release date.

■ 24 (13.5%) serving time beyond their maximum guideline were paroled. At the time of release, all had served an average of 14.7 yrs, which is 5.5 yrs beyond their average maximum guideline.

53 (29.7%) received continuances less than or equal to their maximum guideline. At their post-Layne review, all had served an average of 11.3 yrs. All received continuances, requiring an average of 15.8 yrs total time to be served. 7 of the 53 received continuances equal to their maximum guideline and are destined to serve time in an elevated category. 46 of the 53 do not have a projected release date.

(At the time of their hearing, all 178 of these inmates had served the minimum sentence required by the trial court.)

C/A1/500B

Ohio Parole Board Decision Sheet

Inmate Last Name: Jordan	**Inmate First Name:** Julius	**# Prefix:** A	**Inmate Number:** 258627

Current Hearing Identifier:

Hearing Month (mm/yyyy): 8/2003	**Type of Hearing:** Layne	**Record Number:** N/A	**Date of Hearing:** 6/4/03

Offense(s) of Conviction:
2 CTS. FEL. ASSAULT

---

1. **Category** 8 **for the conviction**
   - A. Guideline Section No.(s): 211 A,2 X 2
   - B. Details of the conviction behavior. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction: **O/A 4/27/92, INMATE SHOT MALE VICTIM. O/A 5/23/92 , INMATE SHOT ANOTHER MALE VICTIM. MSO APPLIES (2) CAT 7'S = CAT 8**

2. **Criminal History/Risk Score:** 2

3. **The guideline range is** 84-108 months.

4. **Total Time Served:** 132 months *- arrived at by- A. Prison Time:130 months + B. Jail Time Credit: 2 months*
   TPV Arrest Date: ____

H-1

5. 0 infractions that resulted in a new conviction for felony criminal conduct committed in a prison facility/or while in custody. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction.

Category for New Conviction:	**Section No.(s):**	**Criminal History/Risk Score:**	**Guideline Range:**

Details of Conviction Behavior:

6. **Class II Rescission Behavior Guideline Range is** ____ months.

A. 0 disciplinary infractions involving felonious conduct

1. 6-18 months for each infraction	2. = months

Details:

B. 0 disciplinary infractions involving threatening conduct against staff and/or possession of a dangerous instrument

1. 6-12 months for each infraction	2. = months

Details:

C. 2 disciplinary infractions involving possession or use of alcohol and/or a controlled substance other than possession with intent to distribute

1. 3-6 months for each infraction	2. = 6-12 months

Details: 5/25/01 CHR7 MARIJUANA 7/13/01 CHR7 MARIJUANA

BEST AVAILABLE COPY

Inmate Last Name:	**Inmate First Name:**	**# Prefix:**	**Inmate Number:**	**Institution:**
Jordan	Julius	A	258627	TCI

D. 0 disciplinary infractions involving other misdemeanor conduct

1. 0-6 months for each infraction	2. = months

Details:

E. 6 significant disciplinary infractions

1. 0-2 months for each infraction	2. = 0-12 months

Details: 8/31/92CIIR5, 9/11/92CIIR4,12, 3/19/93CIIR12, 2/4/94CIIR5,1/3/99CIIR6,8, 2/9/00CIIR8,23

7. **Aggregate Guideline Range is:** 90-132 months (#3 + #5 + #6)

8. **Rationale of decision within Aggregate Guideline Range:** PANEL RECOMMENDS INMATE FOR PAROLE RELEASE.

9. A. **Circumstances related to the offense(s) of conviction, including crimes that did not result in conviction, and any other factors the APA deems relevant:**

B. **Based on these additional factors, an additional __ months should be served from the date of this hearing before release/next hearing.**

10. A. **Total Time to be Served:** To next hearing ☐ ___ months
To Release ☒ 134 months

B. **Remaining Time to be Served:** To next hearing ☐ ___ months
To Release ☒ 2 months

11. A. **Outstanding Program Achievement** ☐ granted ☒ not granted
B. _ month credit for the following programs:
C. Adjusted Total Time to be Served: months
D. Adjusted Remaining Time to be Served: months

12. **Recommendation:** PAROLE O/A 8/4/03, W/SAS & PH

13. **Instructions/Notes:**

14. **Hearing Panel**

Board Member Signature:	Hearing Officer Signature (if applicable):
Board Member: KK	Hearing Officer (if applicable): PGH/KH

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status. A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

Based on 300 Named Plaintiffs in Database,
21 have assault charges as follows:

Felonious Assault:	17
Attempted Felonious Assault:	2
Aggravated Assault:	2

	Institution Number	**Last Name**	**Trial Court Conviction**
1	A235453	Battles	Felonious Assault
2	R145111	Billheimer	Felonious Assault
3	A279765	Butler	Felonious Assault
4	A252680	Carmon	Felonious Assault
5	A213862	Carmona	Felonious Assault
6	A223481	Case	Felonious Assault
7	A178803	Coyne	Felonious Assault
8	A240325	Frank	Felonious Assault

9	R147962	Griffin	Felonious Assault
10	A345564	Jaobs	Felonious Assault
11	A250427	Morehouse	Felonious Assault
12	W023277	Perzell	Felonious Assault
13	A212292	Polston	Felonious Assault
14	A248005	Richardson	Felonious Assault
15	A299876	Smith	Felonious Assault
16	A335195	Vince	Felonious Assault
17	A234265	Watson	Felonious Assault

Total 17

17/21=.8095 **Percentage** 81%

Attempted Felonious Assault

	Institution Number	Last Name	Trial Court Conviction

1	A303622	Everetts	Attempted Felonious Assault
2	A313600	Griffin	Attempted Felonious Assault

Total 2

2/21=.0952 **Percentage** 9.5%

Aggravated Assault

	Institution Number	**Last Name**	**Trial Court Conviction**
1	A185896	Blassengale	Aggravated Assault
2	A277180	Sherouse	Aggravated Assault

Total 2

2/21=.0952 **Percentage** 9.5%

Based on 300 Named Plaintiffs, *ALL* 21 Plaintiffs with Assault charges received a higher category from the Parole Board.

Aggravated Burglary: 2
Kidnapping: 2
Murder: 2
Attempted Murder: 10
Rape: 5

Aggravated Burglary

	Institution Number	Last Name	Conviction by the Parole Board
1	A235453	Battles	Aggravated Burglary
2	AA335195	Vince	Aggravated Burglary

Total 2
2/21=.0952 **Percentage** 9.5%

Kidnapping

	Institution Number	Last Name	Conviction by the Parole Board
1	A279765	Butler	Kidnapping
2	A234265	Watson	Kidnapping

Total 2

2/21=.0952 **Percentage** 9.5%

Murder

	Institution Number	Last Name	Conviction by the Parole Board
1	R145111	Billheimer	Murder
2	A178803	Coyne	Murder

Total 2

2/21=.0952 **Percentage** 9.5%

Attempted Murder

	Institution Number	Last Name	Conviction by the Parole Board
1	A185896	Blassengale	Attempted Murder
2	A233076	Byther	Attempted Murder
3	A223481	Case	Attempted Murder
4	A313600	Griffin	Attempted Murder

5	R147962	Griffin	Attempted Murder
6	A345564	Jacobs	Attempted Murder
7	A250427	Morehouse	Attempted Murder
8	W023277	Perzell	Attempted Murder
9	A212292	Polston	Attempted Murder
10	A299876	Smith	Attempted Murder

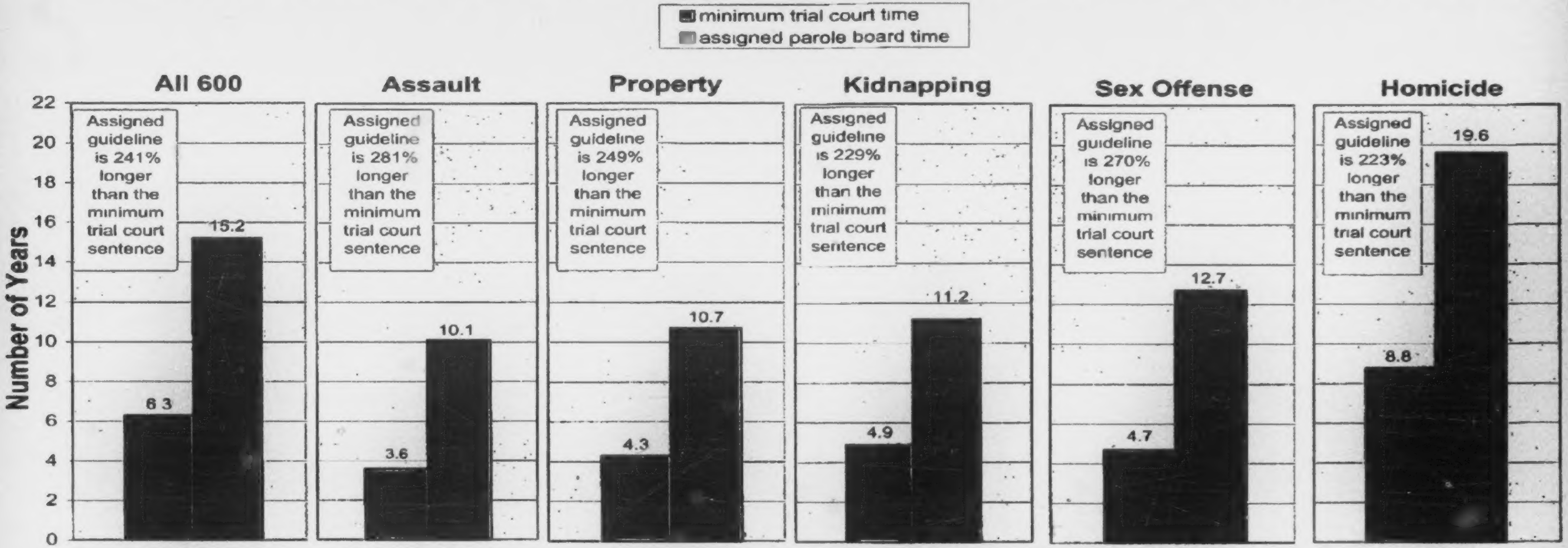
Total 10

10/21=.4761 **Percentage** 48%

Rape

	Institution Number	Last Name	Conviction by the Parole Board
1	A252680	Carmon	Rape
2	A213862	Carmona	Rape
3	A303622	Everetts	Rape
4	A240326	Frank	Rape

MINIMUM TIME REQUIRED BY THE PAROLE BOARD'S "ASSIGNED" GUIDELINE COMPARED TO THE MINIMUM TIME REQUIRED BY THE TRIAL COURT SENTENCE



Assigned guideline is 241% longer than the minimum trial court sentence

Assigned guideline is 281% longer than the minimum trial court sentence

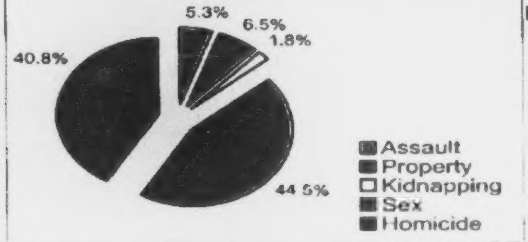
Assigned guideline is 249% longer than the minimum trial court sentence

Assigned guideline is 229% longer than the minimum trial court sentence

Assigned guideline is 270% longer than the minimum trial court sentence

Assigned guideline is 223% longer than the minimum trial court sentence

Percentage of Offenses



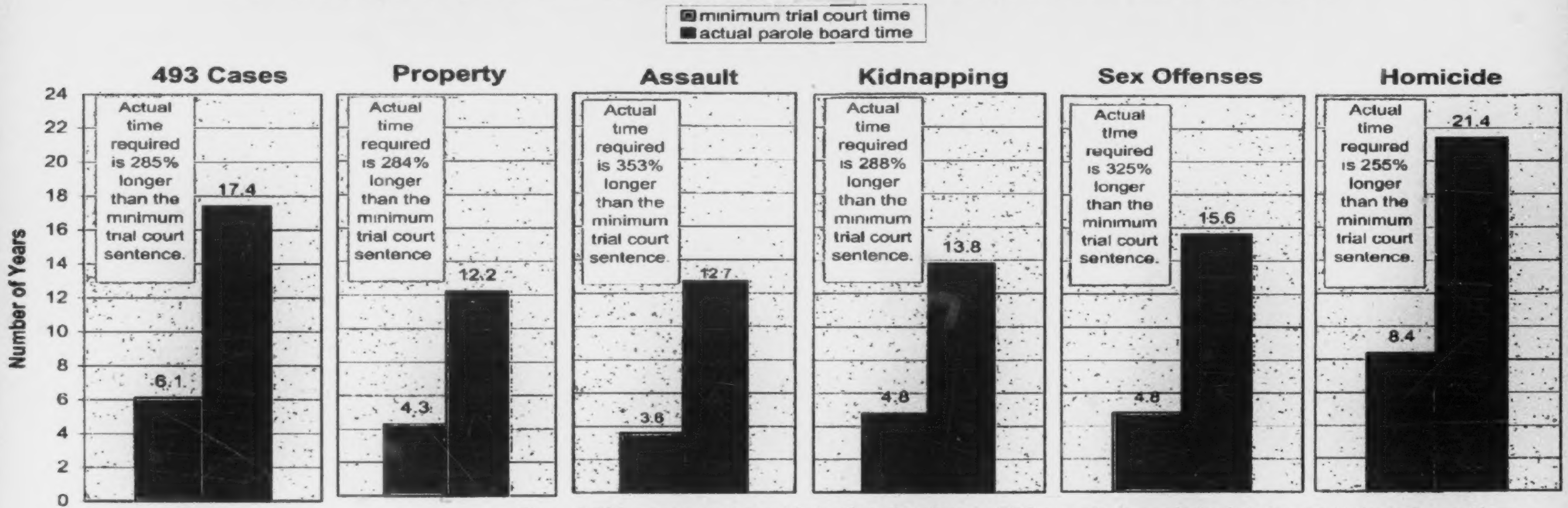
1.1% of the offenses were too insignificant to list.

The time required by the Parole Board's "assigned" guideline is *always* longer than the minimum trial court sentence.

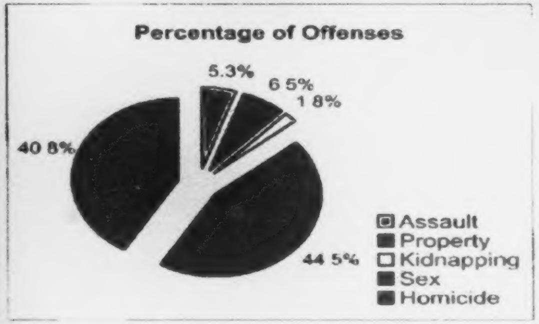
For 100% of old law inmates entered into the database with various offenses, the entry point of the Parole Board's "assigned" guideline is an average 8.9 years, or 241.3%, *longer* than the minimum trial court sentence. The average minimum trial court sentence is 6.3 years, while the average minimum time required by the Parole Board's "assigned" guideline is 15.2 years. These Old Law inmates are destined to serve an average of 2 1/2 times their minimum trial court sentence. Because of this "assignment", good time has been done away with and *ALL* old law inmates have been denied a meaningful consideration for parole at their first hearing.

For a clearer picture, the charts above show the average time required for specific offense categories.

"ACTUAL" TIME REQUIRED TO DATE BY THE PAROLE BOARD COMPARED TO THE TIME REQUIRED BY THE MINIMUM TRIAL COURT SENTENCE



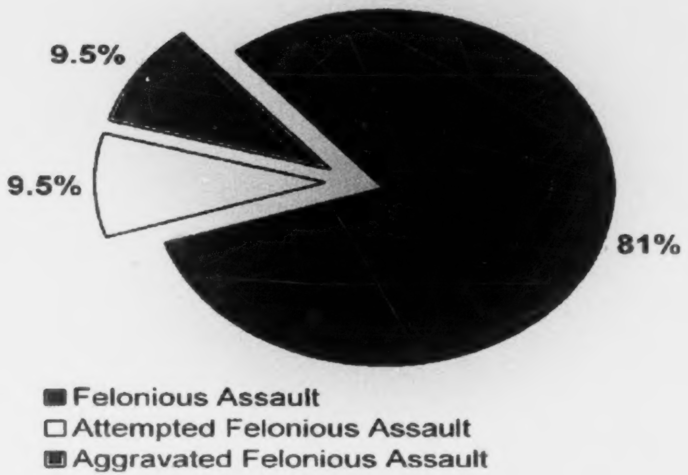
Out of 600 cases entered into the database, 526 parole board decisions contain information showing the "actual" time required to date. (Note: 33 of these cases are required to serve the high end, but do not have a specific time assigned. Their decision reads, "to be determined.")
66% are required to serve the "high-end" of their "assigned" guideline.
25.5% are required to serve the "mid-range of their "assigned" guideline.
8.5% are required to serve the "low-end" of their "assigned guideline.
For the 493 cases with a specific time noted on their decision, an average of 17.4 years is required by the Parole Board compared to 6.1 years required by the average minimum trial court sentence. The Parole Board is requiring 11.3 years, or 285%, more time than the minimum trial court sentence. These inmates are destined to serve nearly 3 times their minimum trial court sentence. This added amount of "discretionary" time is significant; particularly, in light of the fact it exceeds the maximum new law sentence of 10 years for a first degree felony.
(For a clearer picture, the charts above show the average "actual" time required for specific offenses.) categories.



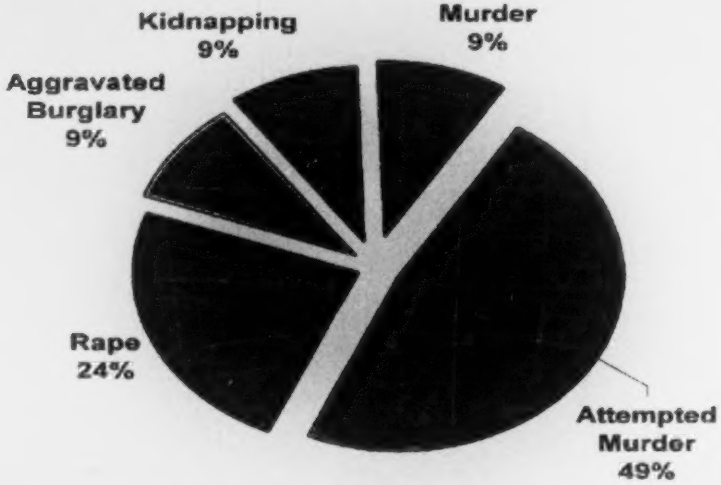
1.1% of the offenses were too insignificant to list

Assault Related Offenses

Trial Court Convictions for Assault



Same Offenders after Parole Board decisions apply Total Offensive Behavior Criteria



After applying its Total Offensive Behavior criteria, the Parole Board has converted every one of the assault crimes to something other than assault. Four (4) of these Assault Convictions are Jury Verdicts.

5	A248005	Richardson	Rape

Total 5

5/21=.2380 **Percentage** 24%

OHIO PAROLE BOARD

GUIDELINES MANUAL

Second Edition
April 1, 2000

Ohio Department of Rehabilitation and Correction
Reginald A. Wilkinson, Director

(D) Category 7 if the offense involved the escape or attempt to escape from secure custody and the offender, at the time of the offense was being detained as a sexually violent predator, or for aggravated murder, murder, or a felony of the first or second degree.

(E) Category 6 in any other case.

(F) If the underlying offense conduct is a misdemeanor (including a minor misdemeanor) involving the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft or aircraft while under the influence of alcohol or drug of abuse, apply the offense guideline for aggravated vehicular homicide.

205. Aggravated Vehicular Homicide

Use the greatest applicable category:

(A) Category 8 if the offender --

  (1) is attempting to elude police;

  (2) has a: blood alcohol content of .20 or more;

    (3) has a prior conviction for aggravated vehicular homicide, vehicular homicide, involuntary manslaughter involving a vehicle, or aggravated vehicular assault;
    (4) has a prior conviction for driving under the influence within the five years preceding the offense;
    (5) is operating without a license or with a revoked or suspended license; or
    (6) is operating the vehicle in an egregiously reckless manner.

(B) Category 7 if the offender has accumulated 12 points for driving infractions within the two years preceding the offense.

(C) Category 4 in any other case.

(D) Exception: If (1) the victim's reckless or negligent conduct is a significant contributing factor in his or her death; or (2) the victim is at least eighteen years of age - or at least sixteen years of age and not more than four years younger than the offender - and voluntarily assumed the risk of the offender's conduct, the offense category shall be one category lower than that set forth above. ....

Page 12

3. If the offense is committed with intent to inflict serious physical harm, the kidnapping guideline will apply. Therefore, Subsection (A) will only apply if the purpose of the offense was not to inflict serious physical hann, but serious bodily injury resulted nevertheless (e.g., the offender does not intend to hurt the victim, but the victim jumps out of a moving car and sustains serious bodily injury).

SUBCHAPTER D - SEXUAL OFFENSES

231. Rape

Use the greatest applicable category:

(A) Category 10 if--
  - (1) serious bodily injury results;
  - (2) the victim is raped by more than one offender;
  - (3) the victim is less than 16 years of age; or

(4) the victim is kidnapped to facilitate the offense.

(B) Category 9 in any other case.

(C) The offense category for an attempt to commit a rape shall be one category lower than that set forth above.

Notes and Procedures

1. "Serious bodily injury" and "permanent bodily injury" are defined in Chapter 10, Subchapter B.

2. For the purposes of this guideline, "kidnapped" means that the victim was moved in a substantial way (*e.g.*, moved from one premises to another) or detained for one hour or more. Movement of the victim from one room of the victim's apartment to another, for example, would not be substantial enough to qualify as kidnapping under the "movement" prong of this definition, but would qualify under the "detention" prong if the victim was detained for an hour or more. This definition of kidnapping is slightly narrower than the statutory definition of kidnapping. Movement or detention that does not qualify as kidnapping under this guideline typically may

be addressed by the placement of the decision within the applicable guideline range.

3. If (1) permanent bodily injury results, (2) the offense involved unusual cruelty or brutality, (3) the victim suffers unusually severe psychological trauma as a result of the offense, or (4) the offense involved numerous instances of sexual abuse committed over an unusually extended period of time, an upward departure may be warranted. ....

Page 70

PART D: GUIDELINE APPLICATION PROCEDURES

101. *Purpose of the Guidelines.*

The purpose of the guidelines is to establish Parole Board policy with respect to parole release decision-making that promote the consistent exercise of discretion, and enables more fair and equitable decision-making, without removing individual case consideration.

The guidelines set forth the customary range of time to be served before release for various combinations of offense (seriousness) and offender (risk of recidivism) characteristics. The Parole Board may depart from the applicable guideline range for "good cause" provided the specific written reasons for the departure are recorded and a copy given to the offender.

The Parole Board intends that the guideline ranges apply to "heartland" cases, the typical cases that embody the conduct and circumstances that fall within the particular guideline range. In an atypical case, a case to which a particular guideline linguistically applies but where the conduct or circumstances differ significantly from the norm in an important way, the Board may depart from the guideline range.

102. *Completion of the Guidelines.*

The guideline worksheet shall be completed at –

(a) All initial parole, shock parole, and non-Senate Bill 2 indefinite transitional control considerations; and

(b) All subsequent parole proceedings in which the guidelines have not previously been applied (except in cases in which the offender has previously been granted a projected release date and has fulfilled the conditions of that date).

The guideline worksheet provides for an assessment of the seriousness of the offender's offense conduct (the vertical dimension of the guidelines) and the offender's risk of recidivism score (the horizontal dimension of the guidelines). The offense seriousness category and risk of recidivism score are used to determine the applicable guideline range.

The person(s) conducting the proceeding shall establish the applicable guideline range and, prior to making a decision or recommendation, shall consider whether a decision within the applicable guideline range is appropriate or whether there is "good cause" for a decision outside (either above or below) the applicable guideline range. ....

Page 75

(j) *Parole Violator This Time.* Any offense or offenses connnitted while on parole are considered in determining the offense category (using the multiple separate offense rule as appropriate). The offense for which the offender was placed on parole is not used in assessing the offense category, but is considered as prior criminal history.

(k) *Confinement/Escape Violator This Time.* In these cases, the offense severity category is calculated for both the crime committed while in custody (awaiting trial, awaiting sentencing, or serving a sentence) or on escape status and the crime for which the offender was serving the sentence and are calculated separately and the times to be served for each of the offenses are added together.

105. Decisions Outside the Guidelines

(a) *In General.* The Parole Board may render a decision outside the guidelines for good cause provided the offender is furnished, in writing, a specific explanation for such action. It is in the Parole Board's discretion to render a decision above or below the guidelines provided there exists an aggravating or mitigating factor(s) sufficient to warrant such a decision and provided the specific reasons for the decision are adequately explained in the notice of the Parole Board's action. The reasons given in the notice of the Parole Board's action for a decision above or below the guidelines must explain what specific facts were relied upon to distinguish the case from the "typical" or "heartland" cases for which the guidelines are set.

If a decision outside the guidelines follows the recommendation of the sentencing judge, the prosecutor or another interested party, it is not sufficient to cite that recommendation as the reason for departure from the guidelines. Instead, the notice of the Parole Board's action must state the reasoning and factual basis for the recommendation, which was found to justify a decision outside the guidelines.

The following are examples of situations in which a decision outside the guidelines appropriately may be considered. This does not mean that these are the only situations in which a decision outside the guidelines may be considered. Nor does it mean that a decision outside the guidelines is mandated for every such case.

Each of the following examples sets forth the Parole Board's reason for its decision and the specific facts primarily relied upon in support of that reason. Avoid sweeping or ambiguous phrases as well as irrelevant facts. Be specific with the facts described so that a person not familiar with the case will know what you are talking about.

(b) *Decisions Above the Guidelines*

   (1) *Unusually aggravated nature of the offense behavior (not taken into account by offense category):*